Supreme Court, U.S.
FILED

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021057 JAN 6 2003

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DON ROPER,
Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

WILLIE SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the United States of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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16 pp

CAPITAL CASE
QUESTION PRESENTED

Can a criminal defendant's trial counsel be held ineffective for making a strategic choice of the sort this Court called "virtually unchallengeable" in *Strickland*, in selecting the theme of a penalty phase defense, when the court of appeals disagrees not with the adequacy of the underlying investigation, but with the wisdom of counsel's choice?

PARTIES TO THE PROCEEDING

Petitioner, Don Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent, Willie Simmons, is confined. Superintendent Al Luebbers, Roper's predecessor, was the respondent in a habeas corpus action in the district court and the appellee in the Court of Appeals.

Respondent Simmons is a prisoner in state custody. He was the petitioner in a habeas corpus action in the district court and the appellant in the court below.

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I. The decision of the court below that a reviewing court may find penalty phase counsel ineffective for his choice of a penalty phase strategy, absent a deficient investigation or lack of legal or factual knowledge is contrary to the decisions of this Court and the decisions of other United States Circuit Court of Appeals that have followed the teaching of this Court. The conflict involves an issue crucial to the administration of criminal justice in that trial counsel must be free to use their best properly informed judgment in choosing penalty phase strategy. If counsel cannot, the trust between attorney and client, the ability of attorneys to rely on informed professional judgment and even the willingness of attorneys to accept capital cases will be impaired.

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IN THE
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Jefferson City Correctional Center

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On Petition for Writ of Certiorari to the United States of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of U.S. Court of Appeals for the Eighth Circuit, by Heaney J., published as *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002), is reproduced in the Appendix ("App.") at A6-A30. The unpublished opinion of the U.S. District Court for the Eastern District of Missouri is reproduced at App. A40-A149. The opinion of the Missouri Supreme Court is published as *Missouri v. Simmons*, 955 S.W. 2d 729 (Mo.1997) and is reproduced at App.A152-A195

JURISDICTION

The Court of Appeals entered its judgment on August 4, 2002, and denied rehearing on October 8, 2002. This

Court has jurisdiction under 28 U.S.C. Section1254(1) The court below had jurisidiction under 28 U.S.C. Section 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amendment VI: "In all criminal prosecutions the accused shall enjoy the right to . . . . have the assistance for counsel for his defense."

Constitution of the United States Amendment XIV Section 1: ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

28 U.S.C. Section 2254(d)(1):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law; as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

Willie Simmons, in separate incidents, murdered Leonara McLendon and Cheri Johnson.

Initially, Simmons was tried jointly for the murders. He was convicted of each and sentenced to death for each (App.A 152). The Missouri Supreme Court overturned the convictions, finding state law error because the trial court did not sever the cases for separate trial (App.A152-A153).

Simmons was again convicted and sentenced to death for each murder after separate trials, and these convictions and sentences were affirmed by the Supreme Court of Missouri (App.A29-A30). The United States Court of Appeals for the Eighth Circuit overturned both death sentences through writs of habeas corpus (App.A29-A30).

The court below found no deficiency in the investigation by penalty phase counsel into Simmons's troubled childhood and family background. (App.A13-A23,A25-A26) The court even agreed that it could be considered reasonable strategy not to bring in this information through the report of a defense mental health expert, as the conclusion of the expert confirmed the State's argument that Simmons is a violent sexual predator (App.A17).

The Missouri Supreme Court had found that calling family members to testify about Simmons's background would have brought negative as well as positive information about Simmons before the jury and would have highlighted the contrast with his brother who was raised in the same home and became a successful physician. (App. A192) . TheMissouri Supreme Court and the court below both recognized the competing considerations in deciding whether to introduce this evidence in the penalty phase at all.

The court below nonetheless held that Simmons's penalty phase counsel was ineffective for deciding not to bring in this evidence. In the court's view, keeping Simmons's boyhood transgressions from the jury and avoiding comparisons with his successful physician brother were

inadequate reasons to justify relying on a plea for mercy from Simmons's mother. (App.A21-A22). The court below found that in light of the strong aggravating evidence, counsel should have known that his strategic choice to assert a defense based solely on a plea for mercy would fail. (App.A20-A21). According to the Eighth Circuit, "some strategy decisions are so unreasonable that they can support a claim of ineffective assistance of counsel" , the selection of a strategy relying on a plea for mercy was such an unreasonable strategic choice. (App.A20).

REASONS FOR GRANTING THE WRIT

The decision of the court below, that a reviewing court may find penalty phase counsel ineffective for his choice of penalty phase strategy absent a deficient investigation or lack of factual or legal knowledge, is contrary to the decisions of this court and the decisions of United States Circuit Courts of Appeals that follow the teaching of this Court. The conflict involves an issue crucial to the administration of criminal justice as counsel must be free to use their best, properly informed judgment in choosing penalty phase strategy. If counsel cannot, the trust between attorney and client, the ability of attorneys to rely on informed professional judgment and even the willingness of attorneys to accept capital cases will be impaired It is an issue that will not be resolved by – though it highlights the importance of – this Court's consideration of *Wiggins v. Corcoran*, a case that will further explore the requirements for an adequate investigation into evidence that might be presented to support a defendant's case for mitigation.

A. The Eighth Circuit's holding erases the line between investigation and trial strategy that this Court identified in *Strickland* – a line that has been followed consistently by other courts of appeals.

In *Strickland v. Washington*, 466 U.S. 668, 690 (1984), this Court was faced with an allegation that penalty phase counsel was ineffective for having his client take full responsibility for his actions and ask for mercy, rather than using character or psychological evidence in an attempt to deflect responsibility for the crime. This Court upheld counsel's decision, and in doing so, it differentiated between the work done by counsel to prepare for trial, and the strategic choices made by counsel at trial. Thus the Court endorsed *habeas* review of counsel's investigatory and research efforts, but opined that "strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *Id.* This Court's teaching in *Strickland* is that there are countless ways to provide effective

legal assistance in any particular case and relying on rigid definitions of effectiveness rather than informed judgment of counsel would dampen the ardor and the independence of trial attorneys, impair trust between attorneys and clients and discourage counsel from accepting criminal cases. *Id.* at 689-690.

This Court has repeatedly reaffirmed the distinction made in *Strickland.* It has consistently rejected challenges to the properly informed decisions of counsel to limit the type or quantity of penalty phase evidence. *See, e.g., Dardén v. Wainright*, 477 U.S. 168, 185-186 (1986) (upholding counsel's strategic choice to rely on a simple plea for mercy rather than presenting background or psychological evidence); *Burger v. Kemp*, 483 U.S. 776, 788-796 (1987) (upholding counsel's strategic choice to present no mitigating evidence despite available evidence of a troubled childhood and psychological problems); *Bell v. Cone*, 535 U.S. 685 (2002) (upholding strategic choice to present no mitigating evidence at all).

On the other side of the *Strickland* line, the Court has endorsed evaluation of the investigatory work done by defendants' counsel. In *Williams v. Taylor*, 529 U.S. 362, 395-396 (2000), the Court found penalty phase counsel ineffective for failing to conduct an investigation that would have revealed extensive mitigating evidence.

The courts of appeals have followed the spirit and letter of the distinction in *Strickland*, recognizing that if the investigation or research was sufficient' counsel's strategic decisions about the theme of the penalty phase defense are "virtually unchallengeable." Among the many cases in which the courts of appeals followed that course are: *Deputy v. Taylor*, 19 F.3d 1485, 1494-1495 (3d Cir. 1994) (counsel not ineffective for making strategic decision to rely on client's recent religious conversion rather than using testimony from family members to emphasize his turbulent past); *Hunt v. Lee*, 291 F.3d 284, 292-295 (4th Cir. 2002) (upholding counsel's strategic decision to present no penalty phase evidence, instead

pleading for mercy on behalf of a defendant); *West v. Johnson*, 92 F.3d 1385, 1406-1410 (5th Cir. 1996) (upholding counsel's decision to present no mitigating evidence when he made a reasonable investigation and it was possible counsel had sound strategic reasons for the decision); *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001) (rejecting claim that defense counsel was ineffective for not presenting evidence of Post-Traumatic Stress Disorder as mitigation and noting that the Sixth Circuit Court of Appeals had only found ineffectiveness in cases in which counsel totally failed to investigate mitigating evidence); *Hayes v. Woodford*, 301 F.3d 1054 (9th Cir. 2002) (counsel was not ineffective for making brief penalty phase presentation aimed at showing the defendant would flourish in a structured prison environment rather than going into his background as mitigation); and *Marek v. Singletary*, 62 F.3d 1298-1300 (11th Cir. 1995) (upholding defense counsel in deciding not to use mitigating evidence that would have attempted to explain a murder in terms of a defendant's childhood).

The decision of the Eighth Circuit here is unique – the first to erase the line between investigation and trial strategy in the choice of the theme of a penalty phase defense. The common thread linking *Strickland* and each of the decisions by the other circuit courts of appeals is respect for the properly informed strategic decision of counsel to limit the presentation of mitigating evidence at the penalty phase of a capital trial. This Court taught in *Strickland* that it is not the province of the federal courts to second-guess a properly informed professional judgment about the type of strategy to be used in a penalty phase defense. Unless the Court grants this petition, trial counsel in just the seven Eighth Circuit states will be subject to having a federal judge replacecounsel's wisdom with the judges' own. That incongruity merits this Court's attention.

B. Permitting federal judges to replace counsel's strategic trial decisions with adversely affects the administration of justice by reducing the automony of defendants' counsel.

This Court's decision in *Strickland* was premised on the understanding that the autonomy of counsel to make properly informed strategic choices is necessary to the criminal justice system. The decision of the court below specifically confines that autonomy. Counsel must now bear in mind that any strategic trial decision to limit the type or quantity of mitigating evidence presented at the penalty phase of a capital trial may be labeled ineffective assistance of counsel even if it is thoroughly investigated and properly informed. And that may not be the limit of the new rule. Having erased the distinction in *Strickland* between investigation and strategy, the Eighth Circuit opens the door to having federal judges supervise, *post hoc*, all aspects of trial strategy.

As specifically applied here, the Eighth Circuit has created a world in which capital defense counsel must present everything known to them in mitigation. Otherwise, they are inviting findings of ineffectiveness – even if presenting some or most of the evidence they discovered is against their best judgment or the wishes of their clients. Such a situation cannot help but affect the relationship between attorneys and clients and the willingness of attorneys to take criminal cases, especially capital cases, in which they may be faced with the dilemma of using a defense strategy that is contrary to their own best judgment, or risking being labeled ineffective by an appellate court that in hindsight disagrees with a strategy that proved unsuccessful. Such a situation cannot help but adversely affect the administration of justice – a result that this Court should not permit without consideration of its interaction with the 18-year-old rule in *Strickland*.

In short, the court below has again created for penalty phase defense counsel the same destructive dilemma this Court removed by its opinion in *Strickland*. The court below should

not be allowed to undo *Strickland* and it progeny without review of its decision.

C. The question posed here will not be resolved by answering the question on which this Court granted the petition in *Wiggins*.

This court recently granted a petition for writ of certiorari in *Wiggins v. Corcoran*, No. 02-311, on the following question:

> Does defense counsel in a capital case violate the requirements of *Strickland* . . . by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows the rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

As shown by the question presented, *Wiggins* fits firmly on the "investigation" side of the *Strickland* line. Like *Taylor*, it will require this Court to further explore just what constitutes a "thorough investigation of the law and facts relevant to plausible options." 466 U.S. at 690. Thus Wiggins insisted, in his argument in support of certiorari, that the Fourth Circuit had departed from precedent in two respects. First, it had "rejected the principle that 'in a capital case the attorney's duty to *investigate* all possible lines of defense is strictly observed.'" Petition for Writ of Certiorari, *Wiggins v. Corcoran*, No. 02-311 ("Wiggins petition"), at 23 (emphasis added), quoting *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999). Second, its approach "conflicts with prevailing standards in other Circuits for determining when counsel has undertaken sufficient *investigation* to justify deferring to counsel's trial tactics." Wiggins Petition at 26 (emphasis added).

Restricted as it is to the investigation stage, *Wiggins* does not raise the question presented here – *i.e.*, the ability of the federal courts to revisit counsel's choice, after a "thorough investigation of the law and [relevant] facts," from among the "plausible options." *Strickland*, 466 U.S. at 690. The conflict between the Eighth Circuit's decision here and the line of cases that follow *Strickland's* investigation/trial strategy distinction will remain. Thus the decision to grant the petition in *Wiggins* should not prevent the Court from taking up this closely related but distinct issue.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

(2)

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2663

Willie Simmons, *

*

Appellant, *

* Order Denying Petition for

vs. * Rehearing and for Rehearing

* En Banc

Allen Luebbers, *

*

Appellee. *

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Chief Judge Hansen, Judge Bowman, Judge Wollman, Judge Loken, and Judge Riley would grant the petition for rehearing en banc.

(5128-010199)
October 8, 2002

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2663/2699

Willie Simmons,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
vs..	*	District Court for the
	*	Eastern District of Missouri
Allen Luebbers,	*	
	*	
Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel. After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, reversed in part, and remanded in accordance with the opinion of this Court.

(5172-010199)

August 14, 2002

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2663
Willie Simmons, *
*
Appellant, *
*
V. *
*
Allen Luebbers, *
*
Appellee. *

Appeals from the United States
District Court for the
Eastern District of Missouri.

No. 01-2699
Willie Simmons, *
*
Appellant, *
*
v. *
*
Al Luebbers, *
*
Appellee. *

Submitted: March 11, 2002

Filed: August 14, 2002

Before McMILLIAN, HEANEY, and MORRIS S. ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

Willie Simmons appeals from the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] We affirm in part and reverse in part.

I. BACKGROUND

Simmons was convicted in a single trial of two counts of capital murder following the deaths of Leonora McClendon and Cheri Johnson. Following the jury's recommendation, the trial court sentenced Simmons to death on both counts. The Missouri Supreme court then overturned the two convictions on the grounds that the murder charges should not have been tried together. State v. Simmons S.W.2d 426 (Mo. 1991) (en banc). On remand, Simmons was tried separately for both murders. He was convicted and sentenced to death after each trial.

Simmons filed two separate motions for post-conviction relief with the trial court. After both sides presented evidence and Simmons underwent a psychiatric examination by a court appointed examiner, the trial court denied both motions. The Missouri Supreme Court affirmed the denial of Simmons's motions for post-conviction relief and affirmed both convictions and sentences. See State v. Simmons, 955 S.W.2d 729 (Mo. 1997) (en banc) (Johnson murder) (hereinafter "Simmons I"; State v. Simmons, 955 S.W.2d 752 (Mo. 1997) (en banc) (McClendon murder) (hereinafter "Simmons II").

On February 22, 1999, Simmons filed two habeas petitions pursuant to 28 U.S.C. § 2254. The district court denied both petitions and granted a certificate of appealability on

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[1]Although these two appeals were filed separately and heard back-to-back by this court, we have consolidated the discussion of Simmons's claims in a single opinion.

twelve of the twenty-eight issues presented in the petitions.[2] These appeals followed.

II. DISCUSSION

Our consideration of Simmons's appeals is governed by 28 U.S.C. § 2254 (1994 & Supp.1998), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19. "Under § 2254(d)(1), the writ may issue only if. . . the state-court adjudication resulted in a decision that (1) 'was contrary to. . - clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of. . . clearly established Federal law, as determined by the Supreme Court of the United States." Copeland v. Washington, 232 F.3d 969, 973 (8th Cir. 2000) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)(O'Connor, J., concurring). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Id. (quoting Williams, 529 U.S. at 412-13). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. (quoting

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[2]The facts underlying Simmons's convictions are discussed extensively in the opinions of the Missouri Supreme Court, and in the district court's orders denying relief on Simmons's petitions. *See* Simmons I, 955 S.W.2d 729; Simmons II, 955 S.W.2d 752; Simmons v. Bowersox, No. 4:97CV2537 (E.D. Mo. March 30, 2001); Simmons v. Bowersox, No. 4:97CV2538 (E.D. Mo. March 30, 2001).

Williams, 529 U.S. at 413). In addition, the Anti-Terrorism and Effective Death Penalty Act of 1996 provides that relief may not be granted to a person in state custody unless the underlying state proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Sexton v. Kemna, 278 F.3d 808,811(8th Cir. 2002) (quoting 28 U.S.C. § 2254(d)); see also Johnston v. Luebbers, 288 F.3d 1048, 1051 (8th Cir. 2002).

A.

Simmons argued to the Missouri Supreme Court that his trial attorneys were constitutionally ineffective because they failed to adequately investigate and present to the trial court evidence of his lack of mental capacity during the guilt phase of the McClendon trial. Simmons now argues that the Missouri Supreme Court's decision was an unreasonable application of clearly established federal law because Simmons's mental health raised questions as to whether he was competent to stand trial, and because Simmons's trial attorneys failed to uncover additional available evidence that would have cast doubt on his ability to comprehend the nature of the proceedings against him. In our view, the Missouri Supreme Court did not err in its analysis of this issue.

As noted by the Missouri Supreme Court, the proper analysis for evaluating an ineffective assistance of trial counsel claim is set forth in Strickland v. Washington, 466 U.S. 668 (1984). To prove a claim of ineffective assistance of counsel, Simmons must demonstrate both that his attorneys' performance was deficient, and that his attorneys' deficient performance prejudiced his defense. Bryson v. United States, 268 F.3d 560, 561 (8th Cir. 2001) (citing Strickland, 466 U.S. at 687; Steinkuehler v. Meschner, 176 F.3d 441, 445 (8th Cir. 1999). To establish the first prong of the Strickland test, Simmons must show that his attorneys' representation fell below the "range of competence demanded of attorneys in

criminal cases." Strickland, 466 U.S. at 688 (quoting McMann v. Richardson, 397 U.S. 759 770-71 (1970). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. However, there is a strong presumption that counsel rendered adequate assistance and that counsel's challenged actions were part of a sound trial strategy. Id. at 689-90. Further, to establish the prejudice prong of the Strickland test, Simmons must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Prior to the McClendon trial, Simmons's trial attorneys acquired reports from four mental health professionals. The first was prepared by Dr. Daniel, who performed a psychiatric evaluation of Simmons in 1990. Dr. Daniel found that Simmons did not show evidence of memory or other cognitive problems, and determined that Simmons did not have a diagnosable psychiatric disorder.

Dr. Fleming also performed a psychological evaluation of Simmons in 1990. Dr. Fleming noted that Simmons was unwilling to participate in the examination. Simmons apparently refused to respond to any questions that he felt to be intrusive, and exhibited mistrust of psychologists. This made it impossible to complete the evaluation. Nevertheless, Dr. Fleming concluded that Simmons had a low borderline intelligence. Dr. Fleming also noted that Simmons had gaps in his memory, evidenced in part by his denial that he ran away to Chicago during his childhood and was assaulted at a bus station. According to Dr. Fleming, Simmons understood the charges against him, and the possible penalties that he faced. He also understood the basic court process. However, Dr. Fleming opined that Simmons was not able to understand his arrest, trial, and the role of his attorneys because of his paranoia

and mistrust of attorneys. Dr. Fleming believed that Simmons's delusions made him
unable to understand the seriousness of his sentence, and that his paranoia prevented him from disclosing important information that might be of value to his attorneys. Dr. Fleming concluded that Simmons was incompetent to stand trial because of his mental status, and that his paranoia and mental illness made him unable to assist his attorneys or to rationally understand the issues.

Dr. Parwatikar and Dr. Peterson were appointed to examine Simmons before Simmons's separate trials for the murders of Johnson and McClendon. Dr. Parwatikar' s report was based on the reports and data procured by other psychologists because, as the examination was about to begin, Simmons refused to be interviewed and demanded to be returned to his cell. Dr. Parwatikar concluded that Simmons was competent to proceed to trial. Dr. Peterson's report focused on mitigation issues because Simmons refused to participate in the examination. Dr. Peterson did not address Simmons's competency to stand trial.

Simmons contends that his trial attorneys were ineffective for failing to conduct an additional pretrial investigation into his competency to stand trial. The Missouri Supreme Court concluded that because Simmons's trial attorneys already possessed four mental health reports on Simmons, and because Simmons refused to cooperate with at least three of the psychiatrists that his attorneys had obtained to examine him, his attorneys' failure to conduct an additional investigation into his competency status was not unreasonable. See Simmons II, 955 S.W.2d at 773. This was a reasonable application of the Strickland standard. Simmons's 1994 trial attorneys conducted an adequate investigation of Simmons's mental health status. Dr. Daniels successfully evaluated Simmons, and Drs. Fleming, Peterson, and Parwatikar tried, but were unable to do so because Simmons refused to cooperate.

Further, Simmons's attorneys testified that throughout their extensive interactions with Simmons, they had not observed any unusual behavior, nor had they encountered any difficulty in communicating with Simmons. At the time of the McClendon trial, it was reasonable for Simmons's attorneys to assume that further attempts to evaluate Simmons's competency would have been futile because of his refusal to cooperate. It was also reasonable for Simmons's attorneys to assume that more extensive psychiatric evaluations could have produced information harmful to any future attempts to portray Simmons as incompetent, because several examining physicians had already reached a contrary conclusion.

Simmons also alleges that his trial attorneys acted ineffectively when they failed to present the issue of his competency to the trial court. However, as noted above, the available reports on Simmons's mental status prior to the McClendon trial failed to conclusively indicate that Simmons was not competent to proceed to trial. Further, it does not appear that Simmons was prejudiced by his attorneys' inaction.

In 1995, Dr. Harry was appointed by the Missouri trial court in connection with Simmons's Rule 29.15 proceedings to conduct a psychiatric evaluation of Simmons. Dr. Harry was instructed to evaluate Simmons to determine whether he was suffering from a mental disease or defect that caused him to be unable to understand the nature of the proceedings against him, or to assist in his own defense. After reviewing the reports from Simmons's previous examinations, and after evaluating Simmons, Dr. Harry concluded that Simmons was competent. Dr. Harry determined that Simmons was aware of his legal defenses and the various strategies available to him, that he understood the court procedures, and that he appreciated the range of possible penalties in the event he was convicted of first degree murder. Dr. Harry also concluded that numerous other factors indicated that Simmons was competent to assist his attorneys. The post-conviction court determined that Dr.

Harry's opinions and testimony were credible and sound. See Simmons v. State, No. 881-00036, slip op. at 38 (Mo. Cir. Ct. Aug. 9, 1995).

In contrast, Dr. Peterson testified at Simmons's post-conviction hearing that after evaluating Simmons a second time in connection with the Rule 29.15 proceedings, he was able to determine that Simmons was not competent to assist his attorneys. However, the post-conviction court rejected Dr. Peterson's opinion, noting that it had "seldom encountered an expert displaying less credibility in a given case . . ." Id. The post-conviction court observed Dr. Peterson as he testified, and concluded that he was "an advocate" who had an "evasive and incredible" demeanor when cross-examined about differences between his diagnosis and that of Drs. Fleming and Daniels. Id. at 39.

Simmons has failed to bring to our attention any Supreme Court cases with facts similar to those in the present case to support his assertion that the Missouri Supreme Court erred when it denied relief on this claim. Further, because of the conflicting diagnoses presented by the examining physicians, and because of Dr. Peterson's apparent lack of credibility, see generally Chadwell v. Koch Refining Co., L.P., 251 F.3d 727,734 (8th Cir. 2001) (noting that trial court is closer to the evidence and better equipped to make credibility determinations), we believe that the Missouri Supreme Court reasonably applied the Strickland standard when it determined that Simmons's attorneys acted effectively despite their failure to pursue the issue of Simmons's competency to stand trial.

B.

Next, Simmons contends that he received ineffective assistance of counsel during the penalty phase of the McClendon trial because his attorneys did not introduce available mental health information or mitigating evidence in

an attempt to persuade the jury to spare his life.

As outlined above, four mental health professionals completed evaluations of Simmons's mental health status prior to the penalty phase. Only one of these mental health professionals concluded that Simmons was incompetent. However, the evaluations uncovered character and background issues that his attorneys could have presented to the jury as mitigating evidence during the penalty phase. For example, after Dr. Daniel examined Simmons in 1990, he reported that Simmons was raised in poverty and that his mother was extremely religious and very strict. When Simmons was a child, he ran away from home and was assaulted at a bus terminal in Chicago. Although he refused to discuss the assault with his parents, he appeared to have been beaten, and professed that he would never "let anyone hurt him again." Simmons refused to discuss this episode during his psychological evaluations.

Simmons was also examined by Dr. Shopper in connection with the post-conviction proceedings. Dr. Shopper stated:

> [A] significant event about which too little is known, is when [Simmons] stole $125.00 from his parents, [and] took a bus to Chicago where he was apparently robbed and beaten up in a bathroom . . . Characteristically, he avoided talking about his three days there and instead created a benign cover story which manifestly fails to explain either his motivation or the events of that three day period. Although he refused to talk about it, it was noted

> that his face looked beaten up, he had a split lip and told either his mother or sister, "I'll never let anyone hurt me again." By all accounts he was traumatized... . [Simmons's parents] did not investigate the matter any further . . . despite their having noticed a rather marked change in his behavior and his aggressivity.
>
> .....
>
> The most likely assumption is that [Simmons] was homosexually victimized in addition to having his money stolen. If only he were robbed and beaten up there would be far less shame about his victimization and a much greater tendency to tell his parents. . . what had happened. It may well be that [Simmons's} frequent and seemingly endless provocations. . . may be connected to [his] traumatization at age twelve. It may also help us understand his inappropriate behavior with several women.
>
> .....
>
> [T]he homosexual rape of a young teenager, when untreated and unrecognized, may cause serious psychological problems in adult life and may have a strong impact on determining psychological defensive structures and configurations. All things being equal, the effect of a homosexual rape in a male is even more serious psychologically than a comparable

heterosexual rape in a woman of a same age.

June 30, 1999 Report of Moisy Shopper, at 3-4, Simmons v. State, No. 88 1-00036, slip op. at 38 (Mo. Cir. Ct. Aug. 9, 1995).

In addition, in 1994, Simmons's attorneys possessed the first report of Dr. Peterson. In that report, Dr. Peterson disclosed that Simmons's parents' marriage was turbulent and permeated by frequent verbal and physical fights in front of Simmons and his siblings. When Simmons was eleven, he unsuccessfully tried to intervene in a physical confrontation between his father and mother. Further, during Simmons's childhood, he was repeatedly spanked by his mother with rulers, straps, and belts as part of her effort to discipline him. This often left welts and bruises on Simmons's body. Although he was toilet trained, he frequently wet himself when his mother beat him and also when he feared that he was about to be beaten. He was routinely beaten by his mother until he was 17 years of age.

The Missouri Supreme Court rejected Simmons's contention that his attorneys were ineffective for failing to introduce this evidence during the penalty phase of the McClendon trial. See Simmons II, 955 S.W.2d at 775. It concluded that Simmons's attorneys could not be blamed for failing to introduce Dr. Peterson's report because certain portions would have been damaging to Simmons. Specifically, Dr. Peterson noted that Simmons displayed "anger at women," that he linked statements of "love with precipitous physical aggression," and that "his own control over the switch from affection to physical violence after rejection or criticism was virtually non-existent." Id. The Missouri Supreme Court concluded that Dr. Peterson's testimony would likely have reinforced the state's portrayal of Simmons as a predator who acted violently towards women. Id.

In our view, the Missouri Supreme Court's decision is deficient. The jury was already aware of Simmons's anger towards women. Peterson's report would have introduced the possibility that Simmons's inability to control his violent behavior was caused by childhood trauma and abuse. This information could have been used in his favor at the penalty stage. Instead, the jury was allowed to conclude that Simmons's violent behavior was simply the result of his wicked and aggressive nature.

Because Dr. Peterson's report could have been used to bolster the state's position, however, we cannot say that the Missouri Supreme Court's decision was an unreasonable application of the Strickland standard. See Strickland, 466 U.S. at 687 (noting that a court must find an attorney's performance was deficient and that the deficient performance prejudiced the defense). The Missouri Supreme Court properly noted that Dr. Peterson's report contained potentially harmful information about Simmons's anger towards women. It was therefore reasonable for Simmons's attorneys to make a strategic decision to refrain from introducing this evidence out of fear that it may contribute to the jury's perception of Simmons as an individual incapable of controlling his violent behavior. See Graham v. Dormire, 212 F.3 d 437, 440 (8th Cir. 2000) (noting that reasonable trial strategy does not constitute ineffective assistance of counsel).

Other evidence about Simmons's background was available however, and we do not agree with the Missouri Supreme Court's decision to reject Simmons contention that his attorneys acted ineffectively when they refused to introduce any evidence of his background. At Simmons's second trial, his attorneys could have introduced evidence that: (1) he was raised in a very strict home environment; (2) his father had a drinking problem and would beat Simmons's mother in front of him; (3) until he was 17 years of age, he was beaten by his mother so severely that he was left with welts and bruises; (4)

he was so scared of being beaten that he would urinate on himself prior to the beatings; (5) he ran away from home at age 12 or 13 and was assaulted, and possibly raped, in Chicago; (6) he grew up in an impoverished neighborhood frequented by street violence; and (7) his IQ was 83. Instead, Simmons's attorneys introduced only one witness during the penalty phase: Simmons's mother. Instead of discussing Simmons's traumatic childhood, Simmons's mother stated that she loved her son and would draw value from a continued relationship with him.

The Missouri Supreme Court rejected Simmons's contention that it was unreasonable for his attorneys not to introduce this background evidence. In support of its decision, the court noted that Simmons's attorneys could have introduced evidence of Simmons's childhood beatings, his father's alcoholism, his parents violent relationship, and his childhood assault in Chicago. See Simmons II, 955 S.W.2d at 776. However, the Missouri Supreme Court reasoned that Simmons's attorneys' decision not to introduce this evidence during the penalty phase of the McClendon trial constituted "clearly sound trial strategy":

> During the penalty phase of Simmons's first murder trial, defense counsel had, in fact, placed much of this [background] information before the jury. That jury, however, decided that the information did not mitigate the aggravating circumstances and sentenced Simmons to death. Considering that the strategy had once failed, and that calling Simmons' relatives to testify about his upbringing would inevitably highlight the fact that his brother had endured the same upbringing yet had become a successful doctor, we agree [that] . . . the penalty phase course of action was . . . sound trial strategy.

Simmons II, 955 S.W.2d at 776.

We believe that the Missouri Supreme Court's resolution of this issue was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). It eludes us how the Missouri Supreme Court could have concluded that evidence of Simmons's traumatic childhood was introduced during the penalty phase Simmons's first murder trial.[3] Our independent review of the record leads us to conclude that the Missouri Supreme Court's conclusions regarding the evidence that was presented during the penalty phase of that trial are completely inaccurate. During the penalty phase of Simmons's first murder trial, his attorneys presented only two witnesses to testify. Neither of these witnesses testified about the beatings suffered by Simmons as a child, his fear of those beatings, his father's alcoholism, his parents violent relationship, or his victimization in Chicago. In fact, both witnesses testified that Simmons's mother was an upstanding person.

The first witness who testified during the penalty phase of Simmons's first murder trial was Ernest White, a member of Simmons's mother's church. White testified that he occasionally spoke with Simmons when Simmons was a teenager. Transcript on Appeal, Volume IV at 1321, State v. Simmons, 815 S.W.2d 426 (Mo. 1991) (en banc). White also testified that if Simmons was sentenced to life, he would "see that the prison ministry will see to him and keep him in check." Id. at 1323.

Anita Clay also attended church with Simmons's

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[3]As stated earlier, Simmons was originally tried and convicted for the murders of McClendon and Johnson in the same proceeding. After these convictions were reversed, Simmons was tried and convicted for the murder of Johnson. He was then tried and convicted for the murder of McClendon.

mother. Clay testified that she had not seen Simmons on a consistent basis since he entered his late teens. Id. at 1328. According to Clay, Simmons was a "smart-alecky" teenager who was "weak" and "followed the crowd." Id. at 1330. Finally, Clay testified that she would help to maintain a relationship between Simmons and his family in the event he was given a life sentence. Id. at 1331.

We have thoroughly reviewed the testimony presented during the penalty phase of Simmons's first murder trial, and have determined that the Missouri Supreme Court erroneously characterized the mitigating evidence presented to the jury during the penalty phase of that trial. Simmons's attorneys failed to present any meaningful mitigating evidence during the first murder trial. Contrary to the Missouri Supreme Court's suggestion, introducing evidence of Simmons's violent, abusive background was not part of a "strategy [that] had once failed." Simmons II, 955 S.W.2d at 776. It was therefore unreasonable for the court to justify Simmons's attorneys' failure to introduce background evidence by speculating that such a strategy would fail again if used again during the McClendon trial.

Moreover, Simmons's attorneys' actions cannot be considered a product of a reasonable trial strategy because there was no justifiable reason to prevent the jury from learning about Simmons's childhood experiences. See U.S. v. Villalpando, 259 F.3d 934, 939 (8th Cir. 2001) (noting that some strategy decisions are so unreasonable that they can support a claim of ineffective assistance of counsel) (citations omitted). By the time Simmons's mother was called to testify, the jury had yet to hear any evidence that was sympathetic to Simmons. Instead, the jury had only heard evidence of his ruthless character. Further, Simmons's attorneys should have been aware that they could not rely on pleas from Simmons's

mother in an effort to spare Simmons's life.[4] During the penalty phase of the McClendon murder trial, Simmons's mother testified that she loved her son and would benefit from a continued relationship with him. This testimony was similar to that proffered by Clay during Simmons's first murder trial.[5] Yet, Clay's testimony proved to be ineffective.

Further, we do not agree with the state's argument that Simmons's attorneys made a reasonable strategic decision to ignore evidence of Simmons's background because they wanted to avoid comparisons to Simmons's successful brother.[6] There

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[4]Simmons's attorneys should have been aware that they could not rely on the testimony of Simmons's mother because she testified during the penalty phase of the Johnson trial. Yet, Simmons was sentenced to death after that penalty phase.

[5]Clay's testimony was apparently intended to demonstrate that Simmons would enjoy a continued relationship with his family, particularly with his mother, if he was sentenced to life in prison. Although the testimony of Simmons's mother provided more emotional appeal, it was also intended to show that Simmons's would continue to be part of a beneficial familial relationship in the event that he was allowed to live.

[6]The Missouri Supreme Court also agreed with the Rule 29.15 court's conclusion that delving too deeply into Simmons's background would do more harm than good, by opening up "dangerous avenues for the State to explore." Simmons II, 955 S.W.2d at 776. We do not agree with this reasoning. The jury had already convicted Simmons of murdering McClendon, and we fail to see how disclosures of childhood transgressions would have caused any significant

was no evidence to suggest that Simmons's brother was beaten as consistently or severely as Simmons, nor was there evidence to suggest that Simmons's brother was sexually assaulted during his childhood. Moreover, considering the overwhelming amount of aggravating evidence that had been proffered by the state, we do not believe that comparisons to a successful brother would have made the jury's perception of Simmons any worse. By the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons's attorneys' representation was ineffective.

The remaining question then, is whether Simmons was prejudiced by his attorneys' failures. The Missouri Supreme Court did not reach this question because it concluded that Simmons's attorneys' penalty phase actions were part of a sound trial strategy. Our review of the record convinces us "that there is a reasonable probability that, but for counsel's" failure to present evidence of Simmons's background, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Throughout the McClendon trial, the state portrayed Simmons as an individual who responded violently when his advances were not accepted by women. During the penalty phase, Simmons's attorneys could have presented evidence of Simmons's background to demonstrate that his compulsive, violent reactions were the result of an abusive and traumatic childhood. Further, a vivid description of Simmons's poverty stricken childhood, particularly the physical abuse, and the assault in Chicago, may have influenced the jury's assessment of his moral culpability. Cf. Williams v. Taylor, 529 U.S. 362,

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harm.

397 (2000) (noting that graphic description of defendant's childhood, filled with abuse and privation, along with evidence of defendant's limited mental capabilities, might influence jury's assessment of moral culpability). Our confidence in the outcome of the McClendon trial has been undermined by Simmons's attorneys' failure to include the details of Simmons's background during their penalty phase presentation. See Strickland v. Washington, 466 U.S. 668, 694 (1984) (noting that a probability sufficient to undermine confidence in the outcome is sufficient to establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). In our view, had this evidence been presented, there is a reasonable probability that at least one of the jurors would have voted against the imposition of the death penalty. This would have allowed the trial judge to resolve the ensuing deadlock by sentencing Simmons to a term of life imprisonment. Thus, Simmons has demonstrated that he was prejudiced by his attorneys' ineffective representation, and he is therefore entitled to a new penalty phase trial.[7]

C.

Next, Simmons argues that the prosecutor made a number of statements during his closing argument in the guilt phase of the McClendon trial that were improper and violated

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[7]Simmons also claims that the trial court allowed the prosecution to present evidence regarding the murder of Cheri Johnson during the penalty phase of his murder trial for the murder of McClendon in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Because we have already granted Simmons a new penalty phase trial, an analysis of this issue is unnecessary.

Simmons's constitutional right to due process.[8] The Missouri Supreme Court rejected this argument and held that no prejudice resulted from the Simmons's attorneys' failure to object to these statements, and that his attorneys were not deficient for failing to object. Simmons II, 955 S.W.2d at 774. Simmons has failed to demonstrate that the Missouri Supreme Court misapplied clearly established federal law in making this decision. Moreover, our review of the challenged statements convinces us that these remarks are not "improper as a matter of federal law" and did not "result[] in sufficient prejudice to merit habeas relief." Johnson v. Luebbers, 288 F.3d 1048, 1057 (8th Cir. 2002).[9]

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[8]Simmons also complains about the several arguments made by the prosecutor during the penalty phase of the McClendon trial. Once again, we need not address this argument, as we have already granted Simmons a new penalty phase trial.

[9]Simmons's petition contains two additional claims. First, he contends that he received the ineffective assistance of counsel during the guilt phase of his trial when his attorneys failed to object to the testimony of Detective Blanks. We have reviewed the testimony of Detective Blanks and have determined that Simmons was not prejudiced when his attorneys failed to object to that testimony. Simmons's guilt was established by a variety of additional evidentiary submissions so the exclusion of Blank's testimony would not have influenced the jury's decision to convict Simmons for McClendon's murder.

Simmons also contends that the federal district court improperly rejected his claim that he is currently incompetent to be executed. Once again, the claim has been rendered moot by our decision to order a retrial of Simmons's penalty phase. Further, although Simmons contends that he was

D.

Next, Simmons argues that his trial attorneys were ineffective for failing to introduce available mitigating evidence during the penalty phase of the Johnson trial. This is essentially the same claim that was presented by Simmons in connection with the habeas proceedings that relate to his conviction for the murder of McClendon. During the penalty phase of the Johnson trial, Simmons's attorneys did nothing more than present his mother to testify that she loved Simmons and would continue to cultivate her relationship with him if he was sentenced to life in prison. In doing so, Simmons's attorneys ignored the same background evidence that was available during the McClendon trial.

The Missouri Supreme Court's analysis of this claim is virtually identical to its analysis of the same claim presented in connection with the McClendon proceedings. The Missouri Supreme Court concluded that because Simmons's attorneys presented background information during the first murder trial, and because this strategy proved to be unsuccessful, it was reasonable for his attorneys to forgo this strategy during the Johnson trial. Simmons I, 955 S.W.2d at 750-51. The Missouri Supreme Court also noted that presenting evidence of Simmons's upbringing would "highlight the fact that his brother had endured the same upbringing and yet had become a successful doctor. . . ." Id.

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incompetent during the McClendon trial, this issue was not presented to the district court, and no certificate of appealability was granted on this issue. Accordingly, we need not address this argument. See Fields v. United States, 201 F.3d 1025, 1026 n. 2 (8th Cir. 2000) (holding that issues beyond scope of certificate of appealability are not properly before court).

Because this claim, and its factual underpinnings, are virtually identical to the claim presented in the McClendon proceedings, we apply that analysis here, and find that the Missouri Supreme Court's resolution of this claim was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The court erroneously believed that evidence of Simmons's background had not affected the outcome of the penalty phase of Simmons's first murder trial. Therefore, it was not reasonable for the court to conclude that Simmons's attorneys made an informed decision to ignore this evidence to avoid a "strategy [that] had once failed." Simmons I, 955 S.W.2d at 750. Once again, we find that Simmons' attorneys' were deficient for failing to introduce this evidence, and that, had this evidence been presented, there is a substantial possibility that at least one juror would have voted in favor of life imprisonment. As such, we hold that Simmons is entitled to new penalty phase trial in connection with the Johnson proceedings.[10]

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[10]Simmons also claims that the federal district court erred when it denied his claim that he is currently incompetent to be executed without holding an evidentiary hearing. This clam has bee rendered moot by our decision to grant Simmons a new penalty phase trial.

In addition, Simmons argues that the prosecutor made a number of statements during the Johnson trial which were improper and violated his right to due process. Simmons also argues that his received the ineffective assistance of counsel when his attorneys failed to object to several of these statements. We have reviewed the trial record, and conclude that the challenged remarks did not "so [infect] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986). Simmons is not entitled to habeas relief on this claim.

E.

Next, Simmons complains that he received ineffective assistance of counsel during the Johnson trial when his attorneys failed to object to testimony regarding his failure to appear for a police interview. During the Johnson trial, Sergeant Sal Chrum testified about his efforts to locate Simmons for a police interview. Chrum stated that Simmons knew the police were looking for him, and agreed to come to the station for an interview after the police contacted him. Chrum then testified that Simmons never appeared for the scheduled interview. Simmons contends that his attorneys should have objected to this testimony because his decision not to appear should not have been used to incriminate him. He argues that his silence is protected by the Fifth Amendment.

Simmons presented this claim differently to the Missouri Supreme Court. There, he argued that Chrum's testimony violated his Fifth Amendment right to silence and did not mention his attorneys' failure to object. The court rejected his claim, reasoning that Detective Chrum's testimony did not implicate Simmons's right to remain silent. Simmons I, 955 S.W.2d at 737. The Court also stated that evidence of a defendant's silence is inadmissible only if the defendant was in custody at the time of his silence. Id. (citation omitted).

We need not address the merits of Simmons's argument. Even if his attorneys failed to object to Chrum's testimony, and that failure rose to the level of ineffective assistance, the evidence presented at trial was sufficient to establish his responsibility for the murder of Johnson, without Chrum's testimony. Therefore, Simmons was not prejudiced by his attorneys' alleged failures, and he is not entitled to habeas relief on this claim.

F.

Finally, Simmons asserts that during jury selection for the Johnson trial, the prosecutor removed Romana Brown, an African-American venireperson, from the jury because of her race, in violation of Batson v. Kentucky, 476 U.S. 79 (1986). In order to bring a Batson challenge, the "party challenging a peremptory challenge must first make a prima facie showing of racial discrimination." United States v. Campbell, 270 F.3d 702, 705 (8th Cir. 2001) (citing Purkett v. Elem, 514 U.S. 765, 767 (1995). "'This can be done by showing circumstances that give rise to a reasonable inference of racial discrimination..'" Id. (quoting United States v. Hill, 249 F.3d 707, 714 (8th Cir. 2001)). Once this showing is made, the burden shifts to the State to provide a "neutral explanation for challenging black jurors." Batson, 476 U.S. at 97. The defendant then has the "opportunity to argue that the prosecutor's facially neutral explanations were merely a pretext for discrimination." Jones v. Jones, 938 F.23d 838, 844 (8th Cir. 1991).

Simmons complains that the prosecutor's stated reasons for striking Brown were not case-specific, race-neutral explanations, but rather were pretextual and racially motivated. The prosecutor stated that he struck Brown because she was indecisive, seemed to have a bad attitude about jury service, seemed to dislike him, and because she did not appear to support the death penalty. In addition, the prosecutor noted that Brown worked for a downtown postoffice and explained that he had poor results from other jurors who worked there. Simmons claims that the prosecutor's excuse that Brown worked for the post-office is pretext for racial discrimination.

The Missouri Supreme Court applied the Batson standard and rejected Simmons's argument. It concluded that "the reasons set forth by the prosecutor are sufficiently race-neutral . . . to allow us to conclude that the trial court did not clearly err in denying [Simmons's] Batson challenge." Simmons I, 955 S.W.2d at 737. Whether the prosecutor's stated reasons for striking Brown were pretextual is a question of fact.

"In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are 'not fairly supported by the record." Purkett, 514 U.S. at 769 (citing 28 U.S.C. § 2254(d)(8)); see also Weaver v. Bowersox, 241 F.3d 1024, 1031(8th Cir. 2001) (noting that factual findings made by state appellate courts are entitled to the same presumption of correctness as findings of state trial courts) (citation omitted). Moreover, this court has stated that "[o]ur deference to trial court fact-finding is doubly great" when considering Batson challenges because of the "unique awareness of the totality of the circumstances surrounding voir dire." Weaver, 241 F.3d at 1030 (quoting United States v. Moore, 895 F.2d 484, 486 (8th Cir.1990)).

Simmons's showing falls short of rebutting the court's presumptive correctness when it concluded that the prosecutor did not violate Batson. Several of the prosecutor's reasons for striking Brown were predicated upon his observation of Brown's behavior during the course of the voir dire proceeding. Simmons has simply pointed to the record in an attempt to demonstrate that these observations were pretextual. Under these circumstances, however, the record itself is insufficient to allow us adequately assess the prosecutor's stated motivations for his peremptory challenge, as behavior considerations such as "hesitation, lack of eye contact, flippancy and other intangibles [are] observed only by those present in the courtroom." Weaver, 241 F.3d at 1032 (citation omitted). As such, without more, we are unable to conclude that the Missouri Supreme Court's factual findings were incorrect. Simmons is not entitled to habeas relief on this claim.

III. Conclusion.

For the reasons set forth in the text of this opinion, the district court's denial of Simmons's petition for habeas corpus relief is affirmed in part and reversed in part. We remand to the district

court and, direct it to grant Simmons new penalty phase trials for his convictions for the murders of McClendon and Johnson.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIE SIMMONS,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 4:97CV2537 RWS
	)	
ALLEN LUEBBERS	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff Willie Simmons' ("Simmons") Motion Pursuant to Rule 59(e) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus. Simmons asks the Court to set aside its judgment dated March 30, 2001, to prevent manifest errors of law. Specifically, Simmons takes issue with the Court's ruling on the following grounds:

> 1) Ineffective Assistance of Counsel Through Failure to Present Mitigating Evidence; and
> 2) Unduly Prejudicial Evidence of Unadjudicated Offense in the Penalty Phase.

Because the Court does not believe its judgment created manifest errors of law, Simmons' motion to set aside the order will be denied.

Additionally, Simmons asks that the Court grant certificates of appealability on those grounds that the Court

previously found that a certificate of appealability was not warranted. The Court will deny this request.

Finally, Simmons seeks a stay of execution to allow for timely filing of a notice of appeal. The record does not show that a date has been set for Simmons' execution that could be stayed. Simmons' request for a stay of execution will also be denied.

Factual Background

Cheri Johnson's murdered body was found under the bed in her apartment, hidden by several articles of clothing, on December 1, 1987.

On November 30, 1987, Johnson's neighbors heard a loud disturbance including a woman's screams coming from her apartment. The apartment's security guard was notified and went to Johnson's apartment. A male voice stated everything was okay, but he would not allow the security guard to enter the apartment to investigate the disturbance. The security guard filed a report and informed the incoming officer of the incident.

Johnson's murder was discovered after her sister became worried when Johnson did not go to work the next day. Johnson's sister, accompanied by the apartment's security guard, went into Johnson's apartment. They did not find anyone. Later, that day, police officers responding to a missing person report, found Johnson's murdered body pushed under the bed. A small barbell with blood on one end was also found on the floor. Johnson's skull had been bludgeoned with the barbell. Johnson was also found with a necktie around her neck. The medical examiner determined the cause of death to be asphyxiation.

During their search of Johnson's apartment, the police seized the necktie found around Johnson's neck and a carnation wrapped in purple paper. The police traced the flower in the purple wrapping paper to Nettie's Florist, a florist located in St. Louis Center. The police interviewed the employees at Nettie's Florist who reported selling two carnations to a man in a

necktie. They identified the man. to be Willie Simmons. The employees believed Simmons worked at Walgreens. The supervisor at Walgreens identified the necktie as Simmons' and gave the police Simmons' address.

Simmons agreed to come to the police station for an interview on January 3, 1988. Simmons told the police that he had met Johnson at a shoe store in St. Louis Center, but that he had not dated Johnson. Simmons denied ever entering Johnson's apartment. Simmons then changed his story to say that he had been to her apartment, showered, changed, and left clothes there. He also stated that Johnson had given him a key to her apartment. Simmons said that he last saw Johnson on November 30 at St. Louis Center. Simmons claimed Johnson asked him to pick up some items for her and he took them to her apartment, gave her the carnation, and left without entering. He later stated that he had entered her apartment, but Johnson told him to leave because she was expecting company.

The police arrested Simmons after this interview. As a result of the arrest, the police conducted an inventory search of Simmons' possessions. Simmons' wallet contained three pawn tickets, one of which was made out to the name of Leonora McClendon by Fay's Furniture Store. The other pawn tickets were for jewelry which was later identified by Johnson's parents as jewelry belonging to Johnson. Simmons' wallet also contained three claim checks for film which had been left for development at a CPI photography lab. The claim checks produced several photographs of Simmons with various women. One was a picture of Simmons with female employees at Nettie's Florist on the day of the murder.

Simmons was tried for Johnson's murder.

Procedural Background

Willie Simmons was tried twice by the State of Missouri for the murder of Cheri Johnson. Both jury trials resulted in a guilty verdict and a recommended sentence of death.
The first jury trial included charges of murder of two women,

Cheri Johnson and Leonora McClendon. Simmons was originally tried for both murders in the same trial. The jury returned verdicts of guilty on both murders and recommended a sentence of death. The Missouri Supreme Court overturned the original convictions. State v. Simmons, 815 S.W.2d 426 (Mo. bane 1991). The Missouri Supreme Court decided that it was improper to have combined both murder charges in one trial.

The two murder charges were returned to the trial court to be tried separately. Simmons was first tried for the murder of Cheri Johnson and once again found guilty. Again, the jury recommended a sentence of death. That trial was followed by the trial for the murder of Leonora McClendon. Simmons was convicted and sentenced to death for the murder of Ms. McClendon.[1]

Simmons filed a motion for post-conviction relief with the trial court. Following presentation of evidence and a psychiatric examination by a court appointed examiner, the court denied Simmons' motion for post-conviction relief.

Simmons appealed the conviction and the sentence to the Missouri Supreme Court.

The Missouri Supreme Court affirmed the denial of post-conviction relief and affirmed

petitioner's conviction and sentence. State v. Simmons, 955 S.W.2d 729 (Mo. banc

1997). The court subsequently denied Simmons' motion for rehearing. The United

States Supreme Court denied certiorari on February 23, 1998, Simmons v. Missouri, 522

U.S. 1129 (1998).

On December 19, 1997, Simmons filed a pro se motion to appoint counsel in this Court. The Court appointed counsel

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[1]Simmons' petition fer writ of habeas corpus related to his conviction for the murder of Leonara McClendon is decided by this Court in a companion opinion.

to represent Simmons. On February 22, 1999, Simmons filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

On March 30, 2001, this Court denied Simmons' writ of habeas corpus on all twelve grounds raised. The Court granted Simmons a certificate of appealability on four grounds. Simmons filed his motion to set aside the Court's judgment on April 13, 2001.

Legal Standard

Federal Rule of Civil Procedure 59(e) explicitly clarifies that district courts possess the power to rectify their own mistakes in the period immediately following entry of judgment; Bannister v. Armontrout, 807 F.Supp. 415, 556 (W.D. Mo. 1991) (citing White v. New Hampshire Dept. of Employment Sec., 455 U.S. 445, 450 (1982)). A motion to alter or amend may be made based. on the following grounds: 1) an intervening change in controlling law; 2) the availability of new evidence not available previously; or 3) the need to correct a clear error of law or prevent manifest injustice. Id. Simmons bases his Rule 59(e) motion on the ground that a clear error of law needs to be corrected, arguing that it is necessary to prevent manifest injustice.

Analysis

1. Ineffective Assistance of Counsel Through Failure to Present Mitigating Evidence.

In this ground for reconsideration, Simmons reiterates his contention that he received ineffective assistance of counsel during the sentencing phase of his trial because counsel did not present all of the mitigating evidence at its disposal for the jury's deliberation. Simmons argues that reconsideration is necessary because the Court made an error of law. In support of his contention, Simmons relies on Williams v. Taylor, 529 U.S.

362 (2000).

In Williams v. Taylor, the United States Supreme Court granted relief to a habeas petitioner because he received ineffective assistance of counsel in the sentencing phase of his capital murder trial. Williams' defense counsel presented only minimal mitigating evidence at the sentencing phase of Williams' trial. Id. at 394. The record showed that Williams' defense counsel did not begin to prepare for the sentencing phase until one week before the trial began. Id. at 395. Williams' counsel did not conduct an investigation into Williams' childhood history of abuse both at the hands of his parents and the foster care system. Id. Williams' counsel failed to seek prison records and testimony from prison ministry participants indicating good behavior in a structured setting. Finally, Williams' counsel failed to introduce available evidence regarding Williams' limited mental capacity. Id.

The United States Supreme Court held that Williams' counsel's representation fell below the standard for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 688 (1984)[2], because "the failure to introduce the

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[2]In Strickland, the Supreme Court set forth a two-prong test for determining whether trial counsel was unconstitutionally ineffective. Strickland, 466 U.S. at 694.

The first prong of the test requires the movant to show that counsel's performance was deficient. Id. Counsel will be found deficient only if the representation rendered fell below an "objective standard of reasonableness." Id.. at 668. There is a strong presumption that au attorney's performance "falls within the wide range of reasonable professional assistance" arid "might be considered sound trial strategy." Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Judicial scrutiny of counsel's performance must be, and is, highly deferential. Id.

The second prong of the Strickland test requires a showing that the deficient performance prejudiced the

comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision.... [Trial counsel (lid not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. at 396. The Williams Court's determination is not, therefore, based upon the reasonableness of trial counsel's tactical decision not to introduce mitigating evidence. Rather, it is based upon the inherent unreasonableness of counsel's failure to investigate Williams' background for mitigating circumstances in the first place.

When read consistently with that holding, it is obvious that Williams is inapposite to the case presented by Simmons. This is not a case where counsel failed to investigate Simmons' background. The record is replete with the investigative efforts of Simmons' counsel. They spoke to his family, to friends of the family who had attended church with him, and the psychologists. Trial counsel were fully apprized of Simmons' background and the mitigating evidence provided therein. Moreover, trial counsel had already presented the full array of Simmons' mitigating evidence to the jury in his first trial to no avail. In this case, counsel made a tactical decision not to offer the evidence, particularly the psychological findings as well. This is not a case like Williams where counsel failed to even

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defense. Strickland, 466 U.S. at 694. Error are prejudicial if they were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. Id. The movant must show that "but for counsel's unprofessional errors, the result of the proceedings would have been different." Id.

The two prongs of the test are conjunctive, not disjunctive. Id. A movant demonstrating deficient performance by counsel, no matter how egregious, must also, satisfy the prejudice part of the test. Id. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceedings if the error had no effect on the judgment." Id.

investigate for mitigating evidence. In this case, Simmons' counsel made a full investigation and a tactical decision not to put the evidence before the jury during the sentencing phase of Simmons' trial.

For the reasons set forth herein and in the Court's March 30, 2001, Memorandum and Order, the Court does not believe that Simmons received ineffective assistance of counsel during the sentencing phase of his trial.

Relief on this ground is denied.

2. Unduly Prejudicial Evidence of Unadjudicated Offense in the Penalty Phase.

In this ground for reconsideration, Simmons urges the Court to revisit its determination that evidence introduced in the penalty phase of Simmons' trial regarding the murder of Leonora McClendon did not violate Simmons' constitutional rights. Simmons does not offer any new evidence, law or argument in support of his request for reconsideration.

This Court addressed Simmons' argument about the evidence of Leonora McClendon's murder at great length in its March 30, 2001 Memorandum and Order. In summary, the Court noted that victim impact evidence is admissible under Payne v. Tennessee, 501 U.S. 808, 825 (1991). Additionally, under Missouri law, victim impact evidence regarding crimes with which the defendant has been charged, but not yet convicted, is appropriate to prove a non-statutory aggravating circumstance. State v. Bucklew, 973 S.W.2d 83, 96 (Mo. 1998). The Court remains convinced of the correctness of its reasoning in its previous order.

Relief on this ground will be denied.

3. Certificate of Appealability.

Simmons asks that the Court grant certificates of appealability on the grounds that the Court previously found a certificate was not warranted. Simmons, however, does not

make any new argument to explain why he believes the Court needs to correct a clear error of law to prevent manifest injustice. See Bannisici, 455 U.S. at 450.

The Court will deny Simmons' request for certificates of appealability on those grounds for which a certificate was previously denied.

4. Stay of Execution.

Simmons requests the Court to enter a stay of execution for thirty days from the date of this Order to allow for a timely appeal.

The record before the Court does not indicate that an execution date has been set. "If there is no execution scheduled, it cannot be stayed.. . ." Netherland v. Tate, 519 U.S. 1301, 1302 (1996).

Because there is no execution date for the Court to stay, Simmons' request for a stay of execution will be denied.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff Willie Simmons' Motion Pursuant to Rule 59(e) to Set Aside Order Dismissing Petition for Writ of Habeas Corpus [#52] is **DENIED**.

/s/ Rodney W. Sippel
RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 1st day of June, 2001.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIE SIMMONS,	)	
	)	
Petitioner,	)	
	)	
	)	Cause No. 4:97CV2537
	)	RWS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

Petitioner Willie Simmons has been sentenced to death for the murder of Cheri Johnson. Simmons, with the assistance of Court appointed counsel, has filed this motion for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Simmons' motion asserts twelve grounds for relief from his conviction and sentence. Simmons' motion will be denied. Each ground for relief is discussed at length below.

Factual Background

Cheri Johnson's murdered body was found under the bed in her apartment, hidden by several articles of clothing, on December 1, 1987.

On November 30, 1987, Johnson's neighbors heard a loud disturbance including a woman's screams coming from her apartment. The apartment's security guard was notified and went to Johnson's apartment. A male voice stated everything was okay, but he would not allow the security guard to enter the apartment to investigate the
disturbance. The security guard filed a report and informed the

incoming officer of the incident.

Johnson's murder was discovered after her sister became worried when Johnson did not go to work the next day. Johnson's sister, accompanied by the apartment's security guard, went into Johnson's apartment. They did not find anyone. Later, that day, police officers responding to a missing person report, found Johnson's murdered body pushed under the bed. A small barbell with blood on one end was also found on the floor. Johnson's skull had been bludgeoned with the barbell. Johnson was also found with a necktie around her neck. The medical examiner determined the cause of death to be asphyxiation.

During their search of Johnson's apartment, the police seized the necktie found around Johnson's neck and a carnation wrapped in purple paper. The police traced the flower in the purple wrapping paper to Nettie's Florist, a florist located in St. Louis Center. The police interviewed the employees at Nettie's Florist who reported selling two carnations to a man in a necktie. They identified the man to be Willie Simmons. The employees believed Simmons worked at Walgreens. The supervisor at Walgreens identified the necktie as Simmons' and gave the police Simmons' address.

Simmons agreed to come to the police station for an interview on January 3, 1988. Simmons told the police that he had met Johnson at a shoe store in St. Louis Center, but that he had not dated Johnson. Simmons denied ever entering Johnson's apartment. Simmons then changed his story to say that he had been to her apartment, showered, changed, and left clothes there. He also stated that Johnson had given him a key to her apartment. Simmons said that he last saw Johnson on November 30 at St. Louis Center. Simmons claimed Johnson asked him to pick up some items for her and he took them to her apartment, gave her the carnation, and left without entering. He later stated that he had entered her apartment, but Johnson told him to leave because she was expecting company.

The police arrested Simmons after this interview. As a result of the arrest, the police conducted an inventory search of

Simmons' possessions. Simmons' wallet contained three pawn tickets, one of which was made out to the name of Leonora McClendon by Fay's Furniture Store. The other pawn tickets were for jewelry which was later identified by Johnson's parents as jewelry belonging to Johnson. Simmons' wallet also contained three claim checks for film which had been left for development at a CPI photography lab. The claim checks produced several photographs of Simmons with various women. One was a picture of Simmons with female employees at Nettie's Florist on the day of the murder.

Simmons was tried for Johnson's murder.

Procedural Background

Willie Simmons was tried twice by the State of Missouri for the murder of Cheri Johnson. Both jury trials resulted in a guilty verdict and a recommended sentence of death.

The first jury trial included charges of murder of two women, Cheri Johnson and Leonora McClendon. Simmons was originally tried for both murders in the same trial. The jury returned verdicts of guilty on both murders and recommended a sentence of death. The Missouri Supreme Court overturned the original convictions. State v. Simmons, 815 S.W.2d 426 (Mo. bane 1991). The Missouri Supreme Court decided that it was improper to have combined both murder charges in one trial.

The two murder charges were returned to the trial court to be tried separately. Simmons was first tried for the murder of Cheri Johnson and once again found guilty. Again, the jury recommended a sentence of death. That trial was followed by the trial for the murder of Leonora McClendon. Simmons was convicted and sentenced to death for the murder of Ms.

McClendon.[1]

Simmons filed a motion for post-conviction relief with the trial court, Following presentation of evidence and a psychiatric examination by a court appointed examiner, the court denied Simmons' motion for post-conviction relief.

Simmons appealed the conviction and the sentence to the Missouri Supreme Court. The Missouri Supreme Court affirmed the denial of post-conviction relief and affirmed petitioner's conviction and sentence. State v. Simmons, 955 S.W.2d 729 (Mo. bane 1997). The court subsequently denied Simmons' motion for rehearing. The United States Supreme Court denied certiorari on February 23, 1998. Simmons v. Missouri, 522 U.S. 1129 (1998).

On December 19, 1997, Simmons filed a pro se motion to appoint counsel in this Court. The Court appointed counsel to represent Simmons. On February 22, 1999, Simmons filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

STANDARDS OF REVIEW

Under 28 U.S.C. § 2254, a state prisoner may petition a federal court for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws of the United States." 28 U.S.C. § 22 54(a). A state prisoner is entitled "to relief on federal habeas corpus only upon proving that [his] detention violated the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." Wessling v. Bennett, 410 F.2d 205, 209 (8th Cir. 1969) (quoting Townsend v. Sain, 372 U.S. 293, 312 (1963)).

Cognizability

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[1]Simmons' petition for writ of habeas corpus related to his conviction for the murder of Leonora McClendon is decided by this Court in a companion opinion.

"[I]t is not the province of a federal habeas court to re-examine state-court determination of state-law questions." Gee v. Groose, 110 F.3d 1346, 1349 (8th Cir. 1997) (quoting Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)). Rather, a federal court is limited "to deciding whether a conviction violated the Constitution, laws or treaties of the United States." Id. Thus, claims that do not reach constitutional magnitude cannot be addressed in a petition for habeas corpus. Carter v. Armontrout, 929 F.2d 1294, 1296 (8th Cir. 1991).

Procedural Default

"Federal habeas review is barred when a federal claim has not been 'fairly presented' to the state court for a determination on the merits." Hall v. Delo, 41 F.3d 1248, 1249 (8th Cir. 1994). In Missouri, a claim must be presented at each step of the judicial process in state courts to avoid procedural default. Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994). Even if a federal claim has been "fairly presented" to the state court, a federal court generally will decline to consider a claim if the state court denied it on "independent and adequate state procedural grounds." Coleman v. Thompson, 501 U.S. 722, 729-30 (1991).

A Missouri court may "lift" the bar on an otherwise procedurally defaulted claim by reviewing it on the merits. Jolly, 28 F.3d at 53-54. Absent a decision by a state court to lift the procedural bar on an otherwise procedurally defaulted claim, a federal court will not consider the claim unless the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in fundamental miscarriage of justice. Coleman, 501 U.S. at 750.

To show cause excusing his procedural default, a petitioner must show that some objective factor external to the defense impeded efforts to comply with the state's rules regarding presentation of the claim. Turner v. Delo, 69 F.3d 895, 896-97 (8th Cir. 1995). A petitioner asserting prejudice

must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage,

infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). A fundamental miscarriage of justice can be established only upon a showing of newly discovered evidence of actual innocence. Schlup v. Delo, 513 U.S. 298 (1995).

AEDPA Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214, made numerous changes to Title 28, Chapter 153 of the United States Code, 28 U.S.C. § 224 1-2255, the chapter governing federal habeas corpus petitions. Specifically, in Section 104 of the AEDPA, Congress added new subsection (d) to 28 U.S.C. § 2254. That subsection provides as follows:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

The Supreme Court recently clarified § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses. See Terry Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 15 18-25 (2000). The Court held that a state court decision is contrary to clearly established federal law "if the state court

arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Id. at 1523. A state court decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521.

In a recent decision, the Eighth Circuit set forth the procedure for a court's analysis of a habeas petition. "Because § 2254(d)(l) directs this court to grant [petitioner's] petition only if the trial court's decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedent, we must first identify the controlling case law." Long v. Humphrey, 184 F.3d 758, 759 (8th Cir. 1999). If clearly established Supreme Court precedent exists governing petitioner's claim, the court "must next decide whether the trial court's decision was 'contrary to' or an 'unreasonable application' of the precedent. Id. at 760. In making that determination, the Eighth Circuit has determined that this Court should examine inferior federal court determinations of factually similar cases. Id. The Eighth Circuit's decision in Long predates the United States Supreme Court's Williams decision. The Long reasoning still applies, however, because while § 2254(d)(l) requires federal courts to review state court decisions with reference to United States Supreme Court precedent, the doctrine of stare decisis requires district judges to assume that courts of appeals have properly interpreted that precedent. See Basile v. Bowersox, 125 F.Supp.2d 930, 937 (E.D. Mo. 1999) (citing Evan Tsen Lee, Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual, 51 Vand. L. Rev. 103, 131-36 (1998)). Accordingly, this Court will follow Eighth Circuit

law to the extent it applies to Simmons' claims when determining whether the Missouri Supreme Court's decisions were contrary to or an unreasonable application of federal law.

Section 2254(e)(1) addresses the standard by which this Court is to judge the reasonableness of the state court's determination of the facts in light of the evidence presented in the state court proceedings as required by § 2254(d)(2). Specifically, § 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct, and that the petitioner's burden is to rebut the presumption "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

DISCUSSION

Simmons raises the following grounds in support of his Petition for Writ of Habeas Corpus:

> (1) Ineffective assistance of trial counsel rendered both the guilt and sentencing phase of the trial fundamentally unfair as follows:
>
> > (A) Trial counsel failed to fully investigate Petitioner's competency to stand trial; and
> >
> > (B) Trial counsel's failure to conduct adequate, reasonable investigation; give all available information to expert witnesses; and present mitigating evidence rendered the

penalty phase fundamentally unfair;

(2) The prosecutor made improper arguments during voir dire, and during the opening and closing statements of both the guilt and penalty phase of Simmons' trial;

(3) The trial court allowed the prosecution to present evidence regarding the murder of Leonora McClendon during the penalty phase of Simmons' trial for the murder of Cheri Johnson in violation of Simmons' Fifth, Sixth, Eighth and Fourteenth Amendment rights;

(4) Simmons received ineffective assistance of trial counsel because trial counsel failed to object to the introduction of improper evidence including:

(A) Victim impact evidence introduced during the guilt phase; and

(B) Evidence of Simmons' invocation of his Fifth Amendment right against self-incrimination;

(5) The failure of Judge Dierker, the trial judge, to recuse himself violated Simmons' right to due process and his right to be free from cruel and unusual punishment;

(6) The prosecution presented statutory and non-statutory aggravators that were unsupported by the evidence in violation of Simmons' Fifth, Eighth and Fourteenth Amendment rights;

(7) Simmons' Fourteenth Amendment right to Due Process was violated because the jury's consideration of mitigating evidence was limited;

(8) The Missouri Supreme Court's proportionality review violated Simmons' rights as guaranteed by the Eighth and Fourteenth Amendments;

(9) During voir dire, Simmons' Eighth and Fourteenth Amendment rights were violated when the prosecution used a peremptory challenge in a racially discriminatory way;

(10) Jury instructions No. 4 and No. 17 were unconstitutional because they did not sufficiently define the term reasonable doubt;

(11) The instructions given to the jury during the penalty phase unconstitutionally shifted the burden of proof to Simmons; and

(12) Simmons is not competent to assist counsel because he does not currently understand the nature of the proceedings herein and is not competent to be executed.

Legal Analysis

Because some of the grounds raised by Simmons

require similar legal analysis, rather than address the grounds in numerical order, they will be grouped and considered on content.

The State acknowledges that Simmons has exhausted all of his state remedies by properly presenting the issues to the courts of the State of Missouri and receiving adverse judgments for purposes of 28 U.S.C. §-2254(b) and (c) or by procedurally defaulting on the state remedies otherwise available to him.

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1. Ineffective Assistance of Counsel Claims - Grounds I & 4. Ground IA - Ineffective assistance of trial counsel due to counsel's lack of preparation for the guilt phase of the trial.

Simmons argues that his trial counsel was constitutionally ineffective because counsel failed to present or pursue mitigating evidence regarding Simmons' lack of 1 capacity during the guilt phase of Simmons' trial.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(l); Long, 184 F.3d at 759. The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme precedent. Id.

The United States Supreme Court set forth the precedent controlling ineffective assistance of counsel claims in Strickland v. Washington, 466 U.S. 668, 685-86 (1984). The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. Id. at 687. This right does not, however, require either a letter perfect or a successful defense. Perry v. Leeks, 488 U.S. 272, 279 (1988).

In the Strickland case, the Supreme Court set forth a two-prong test for determining whether trial counsel was constitutionally ineffective. Strickland, 466 U.S. at 687.

The first prong of the test requires Simmons to show that his counsel's performance was deficient. Id. Counsel will be found deficient only if the representation rendered fell below an "objective standard of reasonableness." Id. at 688. There is a strong presumption that an attorney's performance "falls within the wide range of
reasonable professional assistance" and "might be considered sound trial strategy." Id. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Judicial scrutiny of counsel's performance must therefore be highly deferential. Id.

The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 692. Errors are prejudicial if they were so serious as to deprive the defendant of a fair trial, meaning a trial whose result is reliable. Id. at 687. The movant must show that "but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694.

The two prongs of the test are conjunctive, not disjunctive. Strickland, 466 U.S. at 687. A movant demonstrating deficient performance by counsel, no matter how egregious, must also, satisfy the prejudice part of the test. Id. at 692. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691.

The Missouri Supreme Court determined the claim as follows:

> Before his trial, Simmons' trial counsel had access to reports from four mental health professionals: (1) Dr. Daniel; (2) Dr. Fleming; (3) Dr. Parwatikar; (4) Dr. Peterson. The reports by Dr. Daniel and Dr. Fleming had been completed in connection with Simmons' original trial for the murders of both Johnson and McClendon. Dr. Daniel determined that

Simmons had no diagnosable psychiatric disorder, but Dr. Fleming reported that Simmons suffered from a delusional disorder that rendered him incompetent to proceed.

Drs. Parwatikar and Peterson were appointed during preparation for Simmons' separate trials for the murders of Johnson and McClendon. Dr. Parwatikar concluded that Simmons was competent to proceed to trial. This conclusion was based solely on the reports and data of others because Simmons refused to participate in an examination. Likewise, Simmons was uncooperative with Dr. Peterson. Dr. Peterson did issue a report but was unable to address the issue of Simmons' competency to stand trial.

After his separate trials, Simmons received additional examinations in preparation for the Rule 29.15 proceeding. Dr. Peterson again examined Simmons and this time concluded that he was not competent to assist his attorneys. Simmons was also evaluated by Dr. Harry, a psychiatrist appointed on the motion court's own motion. Dr. Harry concluded that Simmons had a mental disease or defect but was competent to stand trial, both at the time of the evaluation and at the time of this trials. He determined that Simmons understood the proceedings against him based on the following factors: (1) he was able to describe the roles arid functions of the major participants in courtroom proceedings; (2) he was aware of legal strategies including guilty pleas to lesser charges; (4) he understood court procedures; (5) he appreciated the

charges against him. as first degree murder; (6) he appreciated the range and nature of possible penalties should he be convicted; and (7) he was aware of the possible outcome. He also determined based on numerous additional factors that Simmons had the ability to assist his attorneys.

Simmons contends that trial counsel was ineffective for failing to conduct additional pretrial investigation into his competency to stand trial. However, trial counsel already had four mental health reports on Simmons. Further, Simmons had refused to cooperate with at least three of the psychiatrists that counsel had obtained to assist in the investigation, so counsel had no reason to believe that Simmons would cooperate with any other mental health experts. Under these circumstances, counsel's failure to pursue additional investigation into Simmons' competency status cannot be deemed unreasonable.

Simmons also accuses trial counsel of ineffectiveness in failing to present the issue of competency to the trial court. The conflicting reports that were available on Simmons' mental status, however, provided little assistance in evaluating his competency. Moreover, trial counsel testified at the postconviction hearing that based on their extensive dealings with Simmons they believed that he did understand the proceedings against him and that he was able to assist them. We find that counsel's performance was not deficient. In addition, we

> agree with the motion court's conclusion that Simmons was not prejudiced because he was competent to proceed to trial. The report of Dr. Harry fully supported the conclusion that Simmons was competent. The motion court found that Dr. Peterson's testimony lacked credibility and, therefore, rejected his finding of incompetency. We give deference to the motion court's superior opportunity to judge the credibility of the witnesses. State v. Twenter, 818 S.W.2d 628, 635 (Mo. bane 1991).
>
> We conclude that the motion court did not clearly err in denying Simmons' claims that his trial counsel was ineffective with regard to the competency issue.

Simmons, 955 S.W.2d at 746-47.

It is clear from the Missouri Supreme Court's discussion that it applied the standard set forth in Strickland to Simmons' ineffective assistance of counsel claim. The Missouri Supreme Court noted that Simmons' counsel had attempted to get at least three professionals to determine Simmons' competency but Simmons refused to cooperate. The court also noted trial counsel's own belief that Simmons was competent. In light of these facts, the Missouri Supreme Court found it was not unreasonable trial strategy to conclude that further attempts at testing would be futile both because Simmons would not cooperate and because Simmons would not be found incompetent even if he did cooperate. This conclusion was not contrary to or an unreasonable application of the Strickland standard. Further, the court's determination of the facts was not unreasonable. As such, Simmons' request for relief on this ground will be denied.

Ground 1B. Ineffective assistance of trial counsel due to counsel's failure to present mitigating evidence in the penalty phase.

Simmons argues that he received ineffective assistance of counsel during the penalty phase of his trial because his counsel did not introduce mental health information that concluded that Simmons was incompetent.

Specifically, Simmons asserts that Dr. Fleming's report indicated that Simmons was becoming increasingly paranoid that the legal system was trying to falsely convict him and recommended further neuropsychological testing. Simmons argues that trial counsel failed first to further develop Fleming's opinion and second to introduce it as evidence of Simmons' incompetence. Simmons also claims that counsel was ineffective during the penalty phase because counsel did not introduce mitigating evidence of mental disease or defect which was contained in the psychological report prepared by Dr. Peterson. In addition, Simmons claims that counsel was ineffective during the penalty phase for failing to introduce the report prepared by Dr. Harry.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(l); Long, 184 F.3d at 759. The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

As an ineffective assistance of counsel claim, this Court has already established that Simmons' claim is to be determined in accordance with the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

The Missouri Supreme Court addressed Simmons arguments concerning the reports of Dr. Fleming and

Peterson as follows:[2]

> Simmons contends trial counsel was ineffective for failing to adequately investigate and present evidence of a mental disease or defect during the penalty phase. As outlined above, four mental health professionals completed evaluations of Simmons' mental health status. Simmons now contends that if trial counsel had provided the mental health professionals with more information, they would have been able to render more complete diagnoses that would have been helpful in the penalty phase. He ignores the statements in the reports of Drs. Parwatikar, Fleming, and Peterson that the reason they could not give a more complete diagnosis was Simmons' failure to cooperate in the examination process. Simmons is now attempting to blame his attorneys for the incomplete evaluations, when it is clear that the lack of a complete evaluation was due to his own voluntary actions. Further, in spite of Simmons' uncooperative nature, his trial counsel was able to obtain a report from Dr. Peterson that focused on relevant mitigating factors. Under these facts, we agree with the motion court's conclusion that Simmons' trial counsel conducted a reasonable investigation of his mental status.

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[2]The Missouri Supreme Court's comments on Dr. Harry's report are included in subsection 1.A. Dr. Harry found Simmons to be competent.

Simmons also asserts that counsel was ineffective for failing to present available mental health information as mitigating evidence. In particular, he insists that counsel should have called Dr. Peterson to testify concerning relevant mitigating factors. Nevertheless, trial counsel testified at the postconviction hearing that a strategic decision was made not to call Dr. Peterson during the penalty phase because his report would have been disclosed to the State and portions of it were particularly damaging to Simmons. Specifically, Dr. Peterson had noted that Simmons displayed "anger at women," that he linked statements of "*love with precipitous physical aggression*," and that "*his own control over the switch from affection to physical violence after rejection or criticism was virtually nonexistent.*"

Although Simmons emphasized the need for mitigating evidence and discounts the harm that such evidence might cause him, we agree that Dr. Peterson's testimony would have reinforced the State's portrayal of Simmons as a predator who was violent towards women. As stated by the motion court:

> The last thing Simmons needed in defending a circumstantial case was psychiatric evidence which would demonstrate that he was psychologically capable, if not predisposed, to precisely the kind of violence against women which the State was

> positing. .. . It was entirely reasonable for [trial counsel] to conclude that delving into Simmons' psyche in front of a jury would be aggravating, not mitigating, and would play directly into the State's hands.
>
> It is clear that in this case Simmons has failed to overcome the presumption that trial counsel's decision not to pursue mental health evidence as a mitigating factor was sound trial strategy.
>
> Simmons, 955 S.W.2d at 749-50 (emphasis added).

Once again, it is clear that the Missouri Supreme Court properly identified the standard to be applied to Simmons' claim. For the same reasons set forth in considering Simmons' previous claim, the Missouri Supreme Court's determination that trial counsel was not deficient for failing to further develop the record on Simmons' competence was not contrary to or an unreasonable application of federal law. The same conclusion is apparent with regard to the Missouri Supreme Court's determination that trial counsel was not deficient for failing to introduce Dr. Peterson's report. While Dr. Peterson's report may have contained mitigating evidence, it also contained a potentially devastating conclusion: that Simmons linked statements of "love with precipitous physical aggression," and that "his own control over the switch from affection to physical violence after rejection or criticism was virtually nonexistent."

Trial counsel knew that introduction of portions of Dr. Peterson's report would lead to the disclosure of the entire report, including the unfavorable portions of the report. Trial

counsel's decision not to use the report was far from deficient.

The Missouri Supreme Court's decision denying relief on this basis was not contrary to, or an unreasonable application of established United States Supreme Court precedent, nor was it based upon an unreasonable determination of the facts. Relief on this ground will be denied.

Simmons also claims that counsel's failure to interview witnesses or discover mitigating evidence is not trial strategy, but a failure to prepare for trial and may be deemed ineffective in that way. Simmons claims that counsel was ineffective during the penalty phase because counsel only called Carla Naert and Simmons' mother to testify as mitigating evidence. Ms. Naert testified that she had seen men other than Simmons around McClendon's apartment around the time of her death. This testimony served as mitigating evidence for a non-statutory aggravator. Mrs. Simmons testified that she loved her son and that she sympathized with the victims' families.

Simmons argues that mitigators can also include a difficult childhood or an abusive family background.

The Missouri Supreme Court addressed this claim as follows:

> Simmons also asserts that his penalty phase defense was insufficient for lack of presentation of mitigating evidence concerning his background and upbringing. His mitigating defense consisted solely of his mother's testimony which emphasized the fact that she loved her son, missed him at holidays, would continue to love him if he served life in prison, and would draw value from a continued relationship with him. The defense strategy was not to seek mercy for Simmons' sake, but to demonstrate that there was a

person, his mother, who would draw value from Simmons' continued existence, and who would suffer a loss from his death.

Simmons now argues that defense counsel should have offered more extensive mitigating evidence. He raises many aspects of his childhood (and his parents' childhood) that he considers as "mitigating." [FN2]. These include both positive and negative aspects of his life. He cites, for example, both the fact that he enjoyed art as a grade school student and the fact that he had to repeat grades in grade school.

> FN2. The background/upbringing information included, inter alia: (1) his parents came from the poor, racist South; (2) his mother was strict with him and sometimes beat him; (3) his father had a possible drinking problem; (4) his parents fought and Simmons sometimes tried to intervene; (5) his mother joined a restrictive religion and tried to get Simmons to join, also; (6) he, alternatively, either enjoyed school and did adequately, or did poorly in school; (7) he ran away from home at age 12 or 13 and was assaulted in Chicago; and (8) a judge's comments at a 1980s plea hearing, in which the judge said that Simmons had

been one of her "good kids on probation."

During the penalty phase of Simmons' first murder trial, defense counsel had, in fact, placed much of this information before the jury. That jury, however, decided that the information did not mitigate the aggravating circumstances and sentenced Simmons to death. Considering that the strategy had once failed, and that calling Simmons' relatives to testify about his upbringing would inevitably highlight the fact that his brother had endured the same upbringing yet had become a successful doctor, we agree with the reasoning of the Rule 29.15 court:

In light of all the information available to them, after discussion with their client, trial counsel decided to rely at penalty phase solely on a plea for mercy from Simmons' mother. This decision was premised on the demonstrated ineffectiveness of prior strategy concerning mitigating circumstances, which had sought to use testimony from [a person who went to church with Simmons' mother] and one of Simmons' previous work supervisors, the belief that comparisons by the jury between Simmons and a successful sibling. . . would be harmful, and the conclusion that the mother's plea was the best hope.... In the final analysis, 1994 trial counsel concluded, rightly, that delving too deeply into Simmons' social history and upbringing would do more harm than good, by opening up dangerous avenues for the State to explore: "areas of danger," in

[defense counsel's] words.

> The penalty phase course of action was clearly sound trial strategy and, therefore, does not constitute ineffective assistance of counsel. See Storey, 901 S.W.2d at 893.

Simmons, 955 S.W.2d at 750-51.

Again, it is clear that the Missouri Supreme Court properly identified the standard to be applied to Simmons' claim. For the same reasons set forth in considering Simmons' previous claims, the Missouri Supreme Court's determination that trial counsel was not deficient for failing to further develop the record on Simmons' background was not contrary to or an unreasonable application of federal law.

Ground 4. Simmons received ineffective assistance of trial counsel because trial counsel failed to object to introduction of improper evidence.

A. Trial counsel's failure to object to victim impact evidence introduced during the guilt phase.

Simmons asserts that he received ineffective assistance of counsel during the guilt phase of his trial when his trial counsel failed to object to testimony which Simmons' characterizes as victim impact evidence.[3] Specifically,

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[3]Simmons also complains that victim impact evidence presented during the penalty phase regarding the McClendon murder was improper. The Missouri Supreme Court did not address this claim. The Court notes that this claim was included in Simmons' appellate brief to the Missouri Supreme Court as an admissibility claim, not a claim of ineffective assistance of counsel. As such, the Missouri Supreme Court

Simmons asserts the following was improper: (1) Johnson's mother's testimony about family heirlooms, holidays, and the impact her daughter's death had on her other children; (2) Johnson's father's testimony about his loss; and (3) the testimony of James Daily, a church friend, when he described Johnson to the jury.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759. The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

Again, the Strickland v. Washington standard requiring objectively deficient performance and prejudice applies to this ineffective assistance of counsel claim.

In applying the Strickland standard to failure to object claims, the Eighth Circuit has held that "the performance of an attorney is not deficient for failure to object to admissible evidence." Anderson v. Goeke, 44 F.3d 675, 680 (8th Cir. 1995) (emphasis added).

Admissibility of evidence is a state law question. On federal habeas review, the state court's determination that evidence is admissible will not be overturned unless admission of the evidence violated federal law or the United

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addressed the admissibility of the victim impact evidence concerning Leonora McClendon, not whether Simmons' counsel was ineffective with regard to this evidence. Because Simmons did not properly preserve the ineffective assistance of counsel claim, the claim has been procedurally defaulted. Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994). Simmons has not presented any argument to excuse the default. Consequently, this Court will not review the claim for federal habeas relief. Coleman v. Thompson, 501 US. 722, 750 (1991).

States Constitution. Maynard v. Lockhart, 981 F.2d 981, 986 (8th Cir, 1992). Admission of evidence is unconstitutional only if its admission "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986); see also Romano v. Oklahoma, 512 U.S. 1, 12 (1994). A petitioner must meet his burden of showing that "absent the alleged impropriety, the verdict probably would have been different." Harris v. Bowersox, 184 F.3d 744, 752 (8th Cir. 1999). Furthermore, in making its determination, the Court "must review the totality of the facts in the case and the fairness of the whole trial." Id. (quoting McDaniel v. Lockhart, 961 F.2d 1358, 1360 (8th Cir. 1992)). Overwhelming evidence of a petitioner's guilt may render harmless even an erroneous admission of challenged evidence. Hobbs v. Lockhart, 791 F.2d 125, 128 (8th Cit. 1986).

The Missouri Supreme Court reviewed both the admissibility of the testimony Simmons complains of and whether Simmons' counsel was ineffective for failing to object to the testimony.[4] The Missouri Supreme Court rejected both the trial court error claim and the ineffective

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[4]The Missouri Supreme Court did not address Simmons' claim that Mr. Johnson's testimony was impermissible victim impact evidence. The Court did not find this claim in Simmons' appellate brief to the Missouri Supreme Court. Therefore, Simmons' claim regarding Mr. Johnson's testimony is procedurally defaulted for failing to present it at each step of the judicial process in state courts. Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994). Because Simmons did not show cause and actual prejudice or fundamental miscarriage of justice to overcome this procedural default in his habeas petition, the Court will not review this claim for federal habeas relief. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

assistance of counsel claim as follows:

> Simmons challenged a number of statements from various witnesses' testimony and asserts that his counsel was ineffective for failing to object. Simmons first alleges improper victim impact evidence in (1) Johnson's mother testifying that she gave a particular ring to her daughter and that her daughter agreed to give it to her daughter; and (2) a defense witness testifying on cross-examination that Johnson was a nice lady with whom he went to church. The first statement is not victim impact evidence but, rather, direct evidence that Johnson would not have given Simmons the ring voluntarily. The second statement, even if arguably victim impact evidence, is so totally innocuous as to warrant no further discussion.

Simmons, 955 S.W.2d at 749.

> There is no ineffective assistance of counsel in the failure to object to any of these statements during guilt phase. All in all, defense counsel appears to have done a remarkable job of objecting at the proper times.

Id.

The Missouri Supreme Court determined that the evidence was admissible. The Missouri Supreme Court's determination that the testimony of Mrs. Johnson was admissible will not be overturned on habeas review because the evidence was not improper victim impact evidence. Rather, Mrs. Johnson's testimony was relevant to identification of her engagement ring and the manner in

which Simmons came into possession of it. Further, even if it had been improper victim impact evidence, it's admission did not violate Simmons' right to due process for the following reasons.

The evidence of Simmons' guilt was extensive. When Simmons was first questioned about Cheri Johnson, he said he had met her but had never been to her apartment. He later stated that he and Johnson had a relationship and that she had given him a key to her apartment, although he was unable to produce the key. He explained that he left some clothes there, including the distinctive necktie found around her neck. Next, he claimed that he had been to her apartment on the day of the murder, left a carnation and other items at the door, but did not go into the apartment. Two pawn tickets issued for Johnson's jewelry and claim checks for photographs were found in his wallet. Simmons explained that Johnson had given him the jewelry to pawn to raise money to fix his car. Later, he claimed that he stole the jewelry from her apartment after finding her dead on the floor. Johnson's autopsy, however, showed scratch marks consistent with forcible removal of jewelry. The record included numerous photographs of Simmons, including one in which he is wearing the distinctive necktie and one of him in Nettie's Florist where he bought the carnation found in Johnson's apartment.

The evidence of Simmons' guilt was extensive and this Court finds that the outcome of Simmons' trial would not have been any different had Mrs. Johnson's testimony not been admitted. The same can be said about the testimony from Cheri Johnson's church friend that she was a nice lady who went to church. This may have been improper victim impact evidence, but even so, its effect in light of the strong evidence of Simmons' guilt was, as the Missouri Supreme Court determined, "innocuous."

Because the evidence, even if improper, did not so infect the trial with unfairness that it would have changed the verdict, there is no due process violation. The Missouri

Supreme Court's determination of admissibility will not be overturned by this Court. This determination applies to Simmons' ineffective assistance of counsel claims as follows.

The testimony complained of was admissible. Federal law establishes that trial counsel's performance is not deficient in failing to object to admissible evidence. The Missouri Supreme Court's rejection of Simmons' ineffective assistance of counsel claim on that basis is not, therefore, contrary to or an unreasonable application of established Supreme Court precedent. Relief on this basis will be denied.

B. Testimony regarding invocation of Simmons' Fifth Amendment right against self-incrimination.

Simmons complains that one of the prosecution's witnesses testified that Simmons knew the police were looking for him, agreed to come to the station, but did not show up. Simmons argues this testimony violated of his Fifth Amendment right and counsel was ineffective for failing to preserve the issue. Simmons cites various cases for the proposition that pre-arrest silence is protected by the Fifth Amendment and, therefore, this testimony was improper. The State argues that Simmons was not in custody at the time the witness testified about, and evidence of a defendant's silence is only disallowed if the defendant was in custody.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(l); Long 184 F.3d at 759. The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

Again, the Strickland v. Washington standard requiring objectively deficient performance and prejudice applies to this ineffective assistance of counsel claim.

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that "use for impeachment

purposes of [defendant's] silence, at *the time of arrest* and *after reviewing Miranda warnings*, violated the Due Process Clause of the Fourteenth Amendment." 426 U.S. at 619 (emphasis added). The Supreme Court has "consistently explained Doyle as a case where the government has induced silence by implicitly assuring the defendant that his silence would not be used against him." Fletcher v. Weir, 455 U.S. 603, 606 (1982) (citing Roberts v. United States, 445 U.S. 552 (1980)). However, the issue here revolves around the prosecution's use of Simmons' failure to meet the investigator and submit to an interview before his arrest.

In Jenkins v. Anderson, 447 U.S. 231 (1980), the Supreme Court found the impeachment by pre-arrest silence was not a constitutional violation:

> We hold that impeachment by use of prearrest silence does not violate the Fourteenth Amendment.
>
> Our decision today does not force any state court to allow impeachment through the use of prearrest silence. Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial. We merely conclude that the use of prearrest silence to impeach a defendant's credibility does not violate the Constitution.

447 U.S. at 240-41.

The Missouri Supreme Court considered Simmons' claim as follows:

> First, Simmons alleges a violation of his Fifth Amendment right to silence when a detective testified that Simmons did not appear for a December 1987 interview even though

> Simmons "knew we wanted to talk to him." The trial court properly overruled Simmons' objection to the detective's testimony. We disagree that the detective's testimony about Simmons' failure to appear for an interview was a comment on Simmons' right to remain silent. Regardless. Simmons was not in custody at that time, and evidence of a defendant's silence is only disallowed if the defendant was in custody. State v. Kinder, 942 S.W.2d 313, 326 (Mo. banc 1996).

Simmons, 955 S.W.2d at 737.

In this case, the Missouri Supreme Court disagreed with Simmons that "the detective's testimony about Simmons' failure to appeal for an interview was a comment on Simmons' right to remain silent." Simmons, 955 S.W.2d at 737. Even if the detective's testimony was a comment on Simmons' pre-arrest silence, the Missouri Supreme Court found that "Simmons was not in custody at that time, and evidence of a defendant's silence is only disallowed if the defendant was in custody." Id., (citing State v. Kinder, 924 S.W.2d 313, 326 (Mo. bane 1996)).

The Missouri Supreme Court"s decision regarding admissibility is consistent with the United States Supreme Court's decisions in Doyle and Jenkins. Admission of the evidence did not violate Simmons' Fifth Amendment rights.

Again, this determination leads to the following analysis of Simmons' ineffective assistance of counsel claim. The complained of testimony was admissible. Federal law establishes that trial counsel's performance is not deficient in failing to object to admissible evidence. Maynard, 981 F.2d at 986. As a result, the court's decision that counsel was not ineffective was neither contrary to nor an unreasonable application of established Supreme Court precedent. Simmons' request for relief on this ground will be denied.

II. The prosecutor made improper arguments during voir dire and during the opening and closing statements of the guilt and penalty phases of Simmons' trial-Ground 2.

Simmons argues that the prosecutor made a number of statements during Simmons' trial which were improper and in violation of Simmons' constitutional right to due process. The exact language of those statements will be set forth below. First, however, the Court must address whether Simmons' claims of error have been preserved for review in this federal habeas proceeding.

The State argues that the majority of these alleged errors are procedurally barred because they were reviewed by the Missouri Supreme Court for plain error only. There is a split of authority within the Eighth Circuit on the question of whether plain error review by a state appellate court waives procedural default by a habeas petitioner, allowing collateral review by this Court. Compare Hornbuckle v. Groose, 106 F.3d 253,257(8th Cir.), cert. denied, 118 S.Ct. 189 (1997) (state court plain error review preserves issue for federal habeas review) with Toney v. Gammon., 79 F.3d 693, 699 (8th Cir. 1996) (state court plain error review does not preserve issue for federal habeas review). This Court will follow that line of cases holding that state court plain error review waives the procedural default by petitioner, thereby preserving the issue for federal habeas review.

In James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999), the Eighth Circuit held that where the Court determines state court plain error review preserved claims for federal habeas review, those claims are to be judged by the standards set forth in the AEDPA, 28 U.S.C. § 2254(d)(l), rather than the plain error review urged by petitioner.[5]

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[5]The Court is aware that Eighth Circuit authority is also split regarding that standard of review to be applied to

The State further argues that even if some of the claims asserted in. this ground for relief were preserved by the Missouri Supreme Court's plain error review, some were not so reviewed, and they are in fact procedurally defaulted. It is unclear whether the Missouri Supreme Court reviewed all of the alleged improper comments for plain error. The wording of the Missouri Supreme Court's Order is ambiguous stating., "[w]e need not pass on the merits of the remainder of the allegedly improper comments. Having reviewed the entire record, we find that no manifest injustice or miscarriage of justice resulted from those comments even if they were improper and, therefore, we have no discretion to grant plain error relief." Simmons, 955 SW.2d at 736-37 (emphasis added). Under these circumstances, this Court will assume that the state court did subject all of the alleged improper comments to plain error review, thereby preserving those claims for review by this Court.

A. Voir Dire

Simmons argues that the prosecutor violated his due process rights when he questioned the venire panel in a highly prejudicial manner.

In accordance with § 2254(d)(1), this Court must first

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this Court when a procedural bar is waived by state court plain error review. Compare James v. Bowersox, 187 F.3d 866, 869 (8th Cir. 1999) (regular § 2254(d)(1) review appropriate) with Burns v. Gammon, 173 F.3d 1089, 1095 (8th Cir. 1999) (plain error review appropriate). Because the due process standard applied to Simmons' claims under § 2254(d)(1) review and the plain error standard of Burns both turn on whether the erroneously admitted evidence infected the trial with unfairness, the outcome of Simmons' claim would be the same under James and Burns review. See Roberts v. Bowersox, 137 F.3d 1062, 1066 (8th Cir. 1998).

identify the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(I); Long, 184 F.3d 759. The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The United States Supreme Court has held that prosecutorial misconduct does not warrant federal habeas relief unless the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 1.68, 181 (1986).[6] Prosecutorial remarks violate due process only when there is a reasonable probability that the remarks affected the outcome. Roberts v. Bowersox, 137 F.3d 1062, 1066 (8th Cir. 1998), cert. denied, 119 S.Ct. 808 (1999). This Court may grant federal habeas relief only if "the prosecutor's argument was so inflammatory arid so outrageous that any reasonable trial judge would have sua sponte declared a mistrial." James v. Bowersox, 187 ,F.3d 866, 869 (8th Cir. 1999). This stringent standard results from the combination of "the strict due process standard of constitutional review, the deferential review mandated by the AEDPA, and [this Court's] less reliable vantage point for gauging the impact of closing argument on the overall fairness of a trial." Id.; see also Sublett v. Dormire, 217 F.3d 598, 600 (8th Cir. 2000).

The Eighth Circuit has construed Darden as setting forth a. two-part test for prosecutorial misconduct: "First, the remarks must have been improper, and second, the remarks

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[6]This Court also employed the Darden test in its analysis of Simmons' claims of evidentiary error. The Eighth Circuit has noted that "the tests arc the same for whether the admission of evidence or prosecutorial misconduct denied a habeas petitioner due process." Anderson v. Goeke, 44 F.3d 675, 678 n.2 (8th Cir. 1995).

must have been so prejudicial as to deprive the defendants of a fair trial." Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998). Unless the reviewing court finds the remarks to be improper, it does not need to reach the question of whether they deprived the defendant of his constitutional right to due process. U.S. v. Cannon, 88 F,3d 1495, 1502 (8th Cir. 1996).

If the Court does need to reach the question of whether challenged remarks violated the defendant's due process rights, it must make that determination by examining the totality of the context in which the remarks were made. Darden, 477 U.S. at 1 82. The Court should consider whether the prosecutor's argument manipulated or misstated the evidence, whether it implicated other specific rights of the accused such as the right to remain silent, whether the trial court gave curative instructions, and the weight of the evidence supporting the conviction. Id.

As stated above, the Missouri Supreme Court summarily denied Simmons' prosecutorial misconduct claims finding "no manifest injustice or miscarriage of justice resulted from those comments even if they were improper and, therefore, we have no discretion to grant plain error relief." Simmons, 955 S.W.2.d at 736. This Court must now determine whether the Missouri Supreme Court's denial of the claims was contrary to the controlling United States Supreme Court precedent identified herein.

The following statements are representative of the repeated remarks during voir dire that Simmons claims were improper:

1. The prosecutor repeatedly told the jury they were "to recommend to the judge the death penalty."

2. Simmons claims the prosecutor misstated the law on several occasions when he made comments like, "[o]n mitigation, all twelve have to agree that there aren't sufficient

reasons not to give him the death penalty." Further, the prosecution told the jury that, "if I prove good legal reasons why he should get the death penalty and they weren't overcome by reasons he shouldn't get it, could you form the personal opinion that he in this case, that is Mr. Simmons in this case, should get the death penalty?"

3. The prosecutor repeatedly sought to commit the jury asking questions like, "And could you vote to impose the death penalty in a circumstantial evidence case?"

The first comments Simmons identifies as prosecutorial misconduct during voir dire were the prosecutor's statements that the penalty phase verdict was merely a recommendation to the judge. Simmons argues these statements led the jury to believe that the decision of Simmons' sentence lay elsewhere. Simmons points to comments such as:

> If I do that, and these aggravating circumstances aren't outweighed or overcome by the reasons not to give him the death penalty, then it becomes for each of you, your personal decision as to whether or not to recommend to Judge Dierker the death penalty for Mr. Simmons.
>
> . . . we're going to ask you in the event that you find Mr. Simmons guilty of Murder in the First Degree to recommend to the judge the death sentence.
>
> . . . even if you find that they are not overcome by the mitigating reasons, you still

> don't have to assess the death penalty or recommend it, it's still up to you finally.

In Roberts v. Bowersox, 137 F.3d 1062 (8th Cir. 1998), cert. denied. 119 S.Ct. 808 (1999), the Eighth Circuit reviewed a claim like Simmons' and held that the prosecutor in that case did not impermissibly lead the jury to believe the decision rested elsewhere. In Roberts, the jury was accurately informed that the judge could only impose the death penalty if they so recommended, but even then, the judge could reduce the sentence to life imprisonment. Roberts, 137 F.3d at 1065. The jury was also told that the "primary duty and responsibility to fix the punishment" was up to them. Id. Further, the court found the statements to be accurate based upon Missouri Supreme Court Rule 29.05 which allows the judge to reduce a sentence within the prescribed statutory limits of the offense. Id.

The Missouri Supreme Court addressed Simmons' claims as follows:

> Simmons asserts that the prosecutor made several improper, objectionable statements during voir dire. However, Simmons objected to only one of these statements, when the prosecutor said that the jurors would make a punishment "recommendation" to the judge. Citing Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639-40, 86 L.Ed.2d 231, (1985), he suggests that the comment "impermissibly led the jury to believe the responsibility for determining the appropriateness of [the] sentence lay elsewhere." This Court, however, has repeatedly rejected this same argument. Antwine v. State, 791 S.W.2d 403, 410 (Mo. bane 1990), cert. denied, 498 U.S. 1055, 111 S.Ct. 769, 11.2 L.Ed.2d 789 (1991); State v.

Roberts, 709 S.W.2d 857, 868-69 (Mo. bane 1986), cert. denied, 479 U.S. 946, 107 S.Ct. 427, 93 L.Ed.2d 378 (1986). The point has no merit.

Simmons, 955 S.W.2d at 736.

In this case, the prosecutor informed the jury up front that the State was seeking the death penalty for Simmons. The prosecutor also stated, "[s]o that will ultimately, if you sit on this case, could be your decision to make." Further, about as many times as the prosecutor referred to recommending the death penalty to the judge, he stated the jurors were to vote for the death penalty, decide what punishment was appropriate and decide to impose the death penalty. Regardless, as the Eighth Circuit pointed out in Roberts, the statements that the judge could not impose the death penalty without the jury's recommendation, arid that it was the jury's responsibility to determine Simmons' punishment, were accurate statements of Missouri law. Roberts, 138 F.3d at 1065.

Because these comments were not improper, there was no need to proceed to the second step of Darden. The Missouri Supreme Court's denial of relief does not run afoul. of established United States Supreme Court precedent. Relief on this basis will be denied.

Second, Simmons asserts that the prosecution misstated the law in two ways. First, Simmons claims the prosecutor explained to the jury that all decisions by the jury must be unanimous at all stages. Simmons argues this is incorrect because the jury need not be unanimous on the mitigating factors.

A further reading of the prosecutor's statement does not support Simmons' claim. The prosecutor stated that all "verdicts" must be unanimous in all stages, not all "decisions." The prosecutor even clarified that statement saying that the unanimous votes were "for guilt, for aggravating circumstances, 'for warranting the death

penalty..." With regard to the mitigating factors, the prosecutor actually said:

> I want to repeat for every one of you to remember, every decision that you have to make along these lines with the exception of one has to be unanimous. You don't have to be unanimous on finding a mitigating circumstance, but for guilt, for finding aggravating circumstances, for finding that they warrant the death penalty, those all have to be - and the decision to give the death penalty and the decision to give fife in prison, all of those have to be unanimous decisions. The on!! one that doesn't have to be is the mitigating circumstances. One person may find that this mitigating circumstance overcomes an aggravating circumstance. Another person may find another mitigating circumstance overcomes an aggravating circumstance.

This does not suggest that the mitigating circumstance determination has to be
unanimous, it suggests the opposite. The prosecutor's statements were not improper. Moreover, even if the statements had been erroneous, they were made during voir dire and their effect was harmless.[7] The jury was properly

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[7]Instruction No. 16 given to the jury stated,

The attorneys will not have the opportunity of arguing the case to you. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you

instructed during the guilt and sentencing portions of the trial. This Court must presume that the jury correctly followed those instructions. Romano v. Oklahoma, 512 U.S. 1, 12 (1994). The Missouri Supreme Court's denial of this claim was not contrary to or an unreasonable application of established Supreme Court precedent. Relief on this basis will be denied.

Second, Simmons argues that the prosecutor incorrectly explained to the jury that they could impose the death penalty based on their personal opinion or decision, as well as aggravators and mitigating factors. Simmons believes that the prosecutor placed more emphasis on the aggravating factors and encouraged the jury to ignore or discount the mitigating factors. Simmons points to statements such as:

> . . . then it becomes for each of you, your personal decision as to whether or not to recommend to Judge Dierker the death penalty for Mr. Simmons.
>
> This is a personal decision and a joint decision.
>
> Likewise, if I then put on evidence that convinced you beyond a reasonable doubt that certain good reasons, good legal reasons existed why he should get the death penalty and they weren't diminished by mitigating reasons why he shouldn't, could you form the opinion in this case he should get the death penalty?

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remember it, the 'reasonable inferences which you believe should be drawn therefrom, and the law is given in these instructions.

Again, the first thing the Court must determine is whether the comments were
improper. The Court does not find these statements to be improper. The prosecutor was attempting to explain to the jury during voir dire that they each have an individual decision to make, but that the result must be a unanimous decision, as to guilt, aggravating circumstances and the death penalty. In addition, the prosecutor accurately explained Missouri law as to the consideration of aggravating and mitigating factors.[8]
Further, it is the prosecutor's responsibility to prove the aggravating circumstances beyond a reasonable doubt. it is the responsibility of the defense to present mitigating factors.

The comments did not violate Simmons' due process rights and the Missouri Supreme Court's determination of Simmons' claim was not contrary to or an unreasonable application of established Supreme Court precedent.

The third type of prosecutorial misconduct Simmons asserts is that the prosecution repeatedly demanded the

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[8]Mo. Rev. Stat. § 565.032 reads:
1. In all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider:
(2) If a statutory aggravating circumstance or circumstances is proven beyond a reasonable doubt, whether the evidence as a whole justified a sentence of death or a sentence of life imprisonment. . . . [T]he trier shall consider all evidence which it finds to be in aggravation or mitigation of punishment . . . . If the trier is a jury, it shall not be instructed upon any specific evidence which may be in aggravation or mitigation of punishment, but shall be instructed that each juror shall consider any evidence which he considers to be aggravating or mitigating.

potential jurors commit to a sentence of death. Some of the prosecutor's statements identified by Simmons were:

> [I]f I prove to you beyond a reasonable doubt that Mr. Simmons committed the murder first of Cheri Johnson by bludgeoning her and strangling her on November 30, 1987, could you find him guilty?
>
> Will you be able to tell them I think it's right and just in the case that he should get the death penalty?
>
> Could you find the defendant guilty. . . knowing the possibility of the death penalty is down the road?

The Court must first determine whether the comments were improper. It is clear that the prosecutor was not seeking a commitment from prospective jurors that they **would** give the death sentence, but that they **could** give a death sentence if all of the prerequisites to such a sentence were proven. The comments show that the prosecutor went further to ensure that neither sentence would be automatic and both would be considered.

It is not inappropriate to ensure that all those ultimately chosen for the jury will consider and would be able to recommend a death sentence. Buchanan v. Kentucky, 483 U.S. 402, 417 (1987). The prosecutor's questioning was not inappropriate under established United States Supreme Court precedent. Thus, the. Missouri Supreme Court's denial of Simmons' claim was not contrary to or an unreasonable application of established United States Supreme Court precedent. Relief on this basis will, be denied.

B. Guilt Phase

Simmons complains specifically about the following arguments made by the prosecutor in the opening and closing arguments of the guilty phase:

1. Simmons "deliberately, premeditatedly, after the lady pleaded with him, bludgeoned her to death...."

2. "[A] young lady, twenty-nine years old, with a smile on her face and the whole world ahead of her, with an opportunity to have children, to have a job, socialize, to be one of our community."

3. "There is no evidence that you have seen here which would point to anyone but him as the killer", and "Did you hear that he was not guilty? Did you hear that this evidence shows him innocent?"

4. "When the Judge tells you that on or about November 30th the defendant caused the death of Cheri Johnson by strangling her and suffocating her...."

5. "If blows like this . . . and putting his hand over her mouth . . . is not deliberation, then there is no deliberation in any murder. . . ."

6. "[A]nd this was a nice piece of police work, I must hand it to the police officers in this case. . .

7. "As you know that is his style . . .";". . . so he was around the mall for a while scouting it out. . ."; "His pictures of his poses

so he could hand them out to his ladies that he might contact. . . "; and "There should be -- there should be in your mind no question that this man is a cold-blooded lady killer. . . when be set about his usual picture taking and flirtation . . ."

8. "[S]he was alive 'for a little while, and I hope to God, I hope to God for her sake . . . ."

In accordance with § 2254(d)(1), this Court must first identify the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(l); Long, 184 F.3d 759. The Court 'must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

Again, the Darden v. Wainwright standard requiring the Court to determine whether the comment was improper, and if so, whether the remarks were so prejudicial as to deprive Simmons of a fair trial, applies to the prosecutor's challenged statements made during the guilt phase.

The Missouri Supreme Court held that:

Simmons raises numerous claims of error regarding allegedly improper statements in the prosecutor's opening and closing guilt phase arguments. None of these errors were preserved for appellate review, however, either because they were not objected to or because they were riot raised in Simmons' motion for new trial. We need not pass on the merits of these allegedly improper statements. After reviewing the entire record, we find that no manifest injustice or miscarriage of justice resulted from those statements even if they

were improper and, therefore, we have no discretion to grant plain error relief

Simmons, 955 S.W.2d at 737.

The Court will assume that the state court did subject all the alleged improper comments to plain error review, thereby preserving those claims for review by this Court. This Court must now determine whether the Missouri Supreme Court's denial of the claims was contrary to or an unreasonable application of the controlling United States Supreme Court precedent identified herein.

The first comment Simmons identified as prosecutorial misconduct was the prosecutor's argument that Simmons "deliberately, premeditatedly, after the lady pleaded with him, bludgeoned her to death . . . ." Simmons claims that the prosecutor graphically described what he believed to have happened to Johnson. Simmons contends that this argument, inflamed the passions and prejudices of the jury and was inappropriate in an opening statement.

In accordance with Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998), this Court must first determine whether the. remark was improper. In making that determination, the Court is mindful that comments reflecting an emotional reaction to the case being tried are improper, See Darden, 477 U.S. at 180, but that as long as the prosecutor does not stray from the evidence and reasonable inferences therefrom, they arc permitted to use colorful language in their arguments to the jury. See United States v. Robinson, 110 F.3d 1320, 1327(8th Cir. 1997).

Applying this standard to the prosecutor's comment, the Court finds, however, that the comment was not an improper emotional appeal. Rather, it was a reasonable description of the evidence which was ultimately admitted. The prosecutor was about to introduce evidence that showed Johnson had been bludgeoned in the head after she pleaded with him. This comment was not made to inflame the passions and prejudices of the jury, but to set out the

prosecutor's case in his opening statement. Because the comment was not improper, the Missouri Supreme Court's denial of relief on this basis is not contrary or an unreasonable application of established Supreme Court precedent. Relief on this basis will be denied.

Simmons claims that the second, fifth, seventh and eighth challenged remarks made by the prosecutor during the guilt phase were improper because they were either based on evidence outside the record or evidence irrelevant to the offense being tried Cheri Johnson's murder.

The Court must first determine whether the remarks were improper. In making that determination, the Court again notes that as long as the prosecutor does not stray from the evidence and reasonable inferences therefrom, they are permitted to use colorful language in their arguments to the jury. See Robinson, 110 F.3d at 1327.

With regard to the second identified remark, Simmons argues that the prosecutor improperly made an irrelevant victim impact argument during his closing argument in the guilt phase. The prosecutor said, "a young lady, twenty-nine years old, with a smile on her face and the whole world ahead of her, with an opportunity to have children, to have a job, socialize, to be one of our community."

The evidence showed Johnson was only 29 years old when she died. She was involved in the church and with her family. It is not unreasonable to infer that a 29-year-old woman would still have an opportunity to have children, a career and community involvement. Further, the trial court properly cautioned the jury that counsel's closing arguments were not evidence.[9] When determining the effect of

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[9]Instruction No. 16 given to the jury stated,

The attorneys will not have the opportunity of arguing the case to you. Their arguments are intended to help you in understanding the evidence and applying the law, but they arc not evidence.

prosecutorial conduct upon the jury, the Court must presume that the jury followed the trial court's instructions in considering the evidence and reaching the verdict. Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994).

The Court finds that the prosecutor's comment, while colorful, was not improper. The Missouri Supreme Court's denial of relief was not contrary to or an unreasonable application of established Supreme Court precedent. The relief requested on this basis will be denied.

Simmons argues that the fifth identified remark, the prosecutor's statement that, "If blows like this, . . and putting his hand over her mouth. . . is not deliberation, then there is no deliberation in any murder", was improper because is suggested the prosecutor had outside knowledge.

It is clear that the comment was a reasonable inference from the evidence that had been admitted. The evidence showed that Simmons bludgeoned Johnson in the head with a barbell and then proceeded to strangle her for four to five minutes with his necktie before she died. This conduct was evidence of deliberation which the prosecutor had to prove in order to carry his burden of proof. Because the Court finds this comment was not improper, the Missouri Supreme Court's denial of relief on, this basis is not contrary to or an unreasonable application of federal law. Relief on this basis will be denied.

Regarding the seventh challenged remark, Simmons argues that the prosecutor's comments about Simmons' style with the ladies and that he was a "cold-blooded lady killer"

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law is given in these instructions.

were improper because his guilt should only be based on the specific offense being tried.

Simmons argues that the prosecutor is relying on other offenses in trying his case. In these statements, however, the prosecutor is not referring to other offenses. The prosecutor stated, "As you know that is his style.. .";". . . so he was around the mall for a while scouting it out. . ."; "His pictures of his poses so he could hand them out to his ladies that he might contact. . . "; and "There should be -- there should be in your mind no question that this man is a cold-blooded lady killer.. . when he set about his usual picture taking and flirtation. . . ." The prosecutor is merely describing Simmons' character as shown by the evidence. At this point in the trial, the jury had seen the pictures referenced in the prosecutor's remark and heard that Simmons had assaulted two women, stolen another woman's vehicle and threatened a female witness against him. The prosecutor's use of colorful language did not stray from the evidence and its reasonable inferences. See Robinson, 110 F.3d at 1327. These comments were not improper.

The Missouri Supreme Court's determination that these comments did not result in manifest injustice is not contrary to or an unreasonable application of United States Supreme Court precedent. Relief on this basis will be denied.

Simmons argues that the prosecutor's eighth identified statement hoping that Johnson did not suffer was improper because it was his personal opinion or belief and was irrelevant. The prosecutor stated, "she was alive for a little while, and I hope to God, I hope to God for her sake. . . ."

The Court finds that the comment was a reasonable inference from the evidence that had been admitted. The medical evidence showed that Johnson had been bludgeoned in the head with a barbell, but was alive for four to five minutes before she died of asphyxiation by strangulation.

Moreover, the comment was not improper because it was made in response to defense counsel's argument. Prosecutors are entitled to a fair response when the defense

attacks the Government's case. United States v. Flynn, 196 F.3d 927, 930 (8th Cir. 1999). The prosecutor's full comment continued:

> that what Mr. Cooper said just isn't true, you know, that she was alive then but his hand was over her mouth and she could hear help outside the door but couldn't say anything and knew she was going to die and knew that she had been beaten already. I hope that isn't the case because that's an even more horrible death than I suggested to you. But it's the method of death. She was suffocated, she was strangled with the tie. Her life's blood eked out of her until her little heart could pump no more. There's no panic.

In light of the context in which the prosecutor made his comment, its responsive nature, and the weight of the evidence supporting Simmons' guilt, the comment Simmons identifies did not violate his due process rights. The Missouri Supreme Court's denial of this claim was not contrary to or an unreasonable application of Supreme Court precedent. Relief based on this challenged comment will be denied.

Next, Simmons claims the prosecutor's remarks identified in the third paragraph were comments on Simmons' failure to testify which Simmons claims shifted the burden of proof to Simmons to prove he was innocent: "There is no evidence that you have seen here which would point to anyone but him as the killer."[10] "Did you hear that he was not guilty?" "Did you hear that this evidence shows him innocent?"

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[10]This statement was objected to by Simmons' counsel, but was overruled by the court.

Again, the first thing the Court must determine is whether the comment was improper. The Eighth Circuit has stated that ambiguous or indirect references to an accused's failure to testify are impermissible where they (1) manifest the prosecutor's intention to draw attention to the defendant's failure to testify, or (2) are such that the jury would naturally have understood them as a comment on the defendant's failure to testify. Sidebottom v. Delo, 46 F.3d 744, 759 (8th Cir. 1995). Further, in Darden, the United States Supreme Court held that where a challenged comment is Invited by defense counsel's own closing, the responsive nature of the comment must be considered in determining the effect of the comment on the jury. Darden, 477 U.S. at 182. Again, a prosecutor is entitled to a fair response when the defense attacks the Government's case. See Flynn, 196 F.3d at 930.

Viewing the comments in context, the first comment was made in the prosecutor's closing statement and the defense objected to this statement. The court overruled defense counsel's objection when the prosecutor pointed out the strong chain of evidence supporting his statement. The other two remarks were made during the prosecutor's rebuttal. Following these remarks, the prosecutor continued to point to the lack of evidence in the record tending to show that anyone other than Simmons had committed the crime. The prosecutor was simply arguing the strength of his case in response to defense counsel's argument that the State lacked the evidence necessary to prove Simmons was the murderer. The prosecutor was not attempting to draw attention to Simmons' failure to testify. Further, the jury would not have naturally understood his remarks to be an attempt to draw their attention to Simmons' failure to testify. The prosecutor was merely pointing out the lack of evidence in the record showing that someone else had murdered Cheri Johnson. These comments were not improper.

Even if improper, the effect of the remarks in light of the totality of the circumstances did not so fatally infect the trial with unfairness that the conviction was a denial of due

process. Darden, 477 U.S. at 181.

The Missouri Supreme Court's holding that there was no manifest injustice was not contrary to, nor an unreasonable application of Supreme Court precedent. Relief on this basis will be denied.

Simmons argues the fourth identified statement, "[w]hen the Judge tells you that on or about November 30th the defendant caused the death of Cheri Johnson by strangling her and suffocating her. . . .", misled the jury to believe that the judge had already determined Simmons' guilt and verified their decision if they found him guilty.

Standing alone, this comment appears improper. If improper, this Court must consider the effect of the remark in light of the totality of the circumstances in which it was made. To prevail, Simmons must show that the argument so fatally infected the trial with unfairness that the conviction was a denial of due process. See Darden, 477 U.S. at 181-82.

The prosecutor was actually commenting on the language of Instruction No. 5 which read:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 30, 1987, in the City of St. Louis, State of Missouri, the defendant caused the death of Cheri Johnson by strangling and suffocating her...

The prosecutor's actual remark was, "when the Judge tells you that on or about
November 30th the defendant caused the death of Cheri Johnson by strangling and suffocating her - let's leave the 'defendant' word out of there . . . ."

In this context, this Court does not find the prosecutor's statement to be improper. The Missouri Supreme Court's ruling that the prosecutor did not mislead the jury was not contrary to nor an unreasonable application of United

States Supreme Court precedent. Relief on this basis will be denied.

Finally, Simmons argues that the prosecutor's sixth challenged statement, "and this
was a nice piece of police work, I must hand it to the police officers in this case. . .," compliments the police work. Simmons claims that the prosecution improperly personally vouched for the witness' testimony and suggested that the jury believe the State's evidence, undermining their discretion.

The Court must first determine if this statement was improper. The United States Supreme Court has stated that vouching for a witness occurs when the prosecutor places the prestige of the government behind the witness or that he has personal knowledge regarding the information beyond the information presented to the jury to support the witness' testimony. Lawn v. U.S., 355 U.S. 339, 359-60 n.15 (1958).

In this case, the prosecutor was merely commending the police work stating that their investigation uncovered the evidence needed to charge Simmons with this crime. The prosecutor continued pointing out the evidence introduced at trial - the police tracing the purple wrapping paper around the carnation to Nettie's Florist, the interviews of Nertie's Florist employees, and the pictures left for development at CPI. Therefore, because the Court finds that the prosecutor's comment was not improper, the Missouri Supreme Court's finding that no manifest injustice resulted was not contrary to, nor an unreasonable application of Supreme Court precedent. Habeas relief requested on this basis will be denied.

C. Penalty Phase

Simmons contends that the prosecutor made several arguments during his opening and closing statements of the penalty phase which violated Simmons' due process rights.

The legal standard used by this Court to determine if his due process rights were violated is the same as that

applied to the arguments made during the guilt phase. The comments identified by Simmons are:

1. "[A]nd you will hear from Marva McClendon what impact the loss of Leonora McClendon has had upon her as a mother and upon the two children of Leonora McClendon."

2. "I was deadly serious about it then, because I felt in my heart of hearts this is where we'd be at, come the end of this trial." Also, the prosecutor spoke of his daughters, "They're twenty-two and nineteen. And if someone would rip them out from my heart and from my community, you know, it would be difficult to follow the law."

3. The prosecutor repeatedly argued that Simmons had constitutional protections, white Cheri Johnson did not.

4. "[H]e, people like him, have to be deterred from ripping our daughters or sisters or wives out of our community, out of our hearts, out of our lives."

5. The prosecutor presumed that Simmons told Johnson, "I'm going to kill you, Bitch" and that Simmons "has a bent or trait or character exhibited by a history of abuse toward women."

6. "If binding and gagging this woman [Leonora] and trussing her up and leaving her in the bathtub to die isn't deliberation, there is no murder in this United States that could

classify as deliberation then."

7. "[U]ltimately, of course, if you cannot agree, the punishment is left up to the Judge."

8. "Don't you think he's [Mr. Johnson] hoping and waiting for you to do what the law doesn't permit him to do, with Mr. Simmons having been given all. the guarantees he needs to be given?"

9. "[W]hat person in this world if they had some means at their disposal, a gun, a baseball bat, something -- would not go to this woman's aid, and if it was necessary, bash him on the back of the head, you know, maybe say stop . . and if you had to bash him hard enough to kilt him, you would be justified, the person would be justified."

10. "Depravity of mind? What person cannot be depraved in mind who ties up a woman and let's [sic] her suffocate to death. with a rag in her mouth in her own bathtub? This is before Cheri Johnson."

11. "He must die, not for anything we have done here, but because of everything that he has chosen to do in his life."

In accordance with § 2254(d)(l), this Court must first identify the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759. The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

Again, the Darden v. Wainwright standard requiring the Court to determine whether the comment was improper, and if so, whether the remarks were so prejudicial as to deprive Simmons of a fair trial, applies to claims of prosecutorial misconduct in statements made during the guilt phase.

The Missouri Supreme Court summarily denied all of Simmons' claims raised regarding the prosecutor's statements during the penalty phase. Again, this Court will assume that the state court did subject all of the alleged improper comments to plain error review, thereby preserving those claims for review by this Court..

First, Simmons argues that the prosecutor improperly encouraged the jury to consider the loss to the family of Leonora McClendon, the woman Simmons was also charged with murdering. The prosecutor said, "and you will hear from Marva McClendon what impact the loss of Leonora McClendon has had upon her as a mother and upon the two children of Leonora McClendon." Simmons argues that the loss to the McClendon family was completely irrelevant.

Similarly, in the sixth challenged remark, Simmons argues the prosecutor improperly argued the fact of McClendon's death and its impact. Simmons claims this improperly compared the Johnson case to others. The prosecutor said, "[i]f binding and gagging this woman [Leonora] and trussing her up and leaving her in the bathtub to die isn't deliberation, there is no murder in this United States that could classify as deliberation then."

The Court must first decide whether the prosecutor's remarks were improper. The United States Supreme Court has held that victim impact evidence is admissible in the penalty phase of a capital murder trial. Payne v. Tennessee, 501 U.S. 808, 827 (1991). Simmons argues that the victim impact evidence in this ease is distinguishable because it came not from the family of the victim for whose murder he was being tried, but from the family of another alleged murder victim. Simmons cites no case law in support of this distinction.

Regardless of the merit of the distinction, Simmons' argument fails because the evidence was not so prejudicial as to fatally infect the outcome of the penalty phase. The victim impact evidence offered at trial was not limited to that of the McClendon family. The friends and family of Cheri Johnson also took the stand and testified as to their loss. There was sufficient evidence to support the jury's penalty phase determination absent the McClendon family's testimony.

Further, relying on Payne, 501 U.S. at 827, 833 (Scalia, J., concurring), the Missouri Supreme Court has held that evidence of non-statutory aggravating circumstances is proper victim impact evidence and can include crimes charged, but not yet convicted. State v. Bucklew, 973 S.W.2d 83, 96 (Mo. 1998). Therefore, discussing the evidence presented regarding the murder of Leonora McClendon, as well as victim impact evidence relating to that crime, was proper. As a result, the prosecutor's comment on admissible evidence did not constitute a due process violation.

The Court's finding that testimony did not affect the outcome is bolstered by the fact that the Johnson jury did not rely upon the murder of McClendon as an aggravating factor. If they did not find beyond a reasonable doubt that Simmons murdered McClendon, it is unlikely they would have considered the effect of McClendon's death on her family when making a sentencing recommendation.

The Missouri Supreme Court's decision that neither of the prosecutor's comments rose to the level of a due process violation was not contrary to or an unreasonable application of federal law. Relief on these grounds will be denied.

The tenth and eleventh challenged remarks made by the prosecutor during the penalty phase were also comments on non-statutory aggravators.

With regard to the tenth identified statement, Simmons claims that the prosecution argued the. statutory aggravator of depravity of mind with evidence from the

McClendon murder when he said, "[d]epravity of mind? What person cannot be depraved in mind who ties up a woman and let's [sic] her suffocate to death with a rag in her mouth in her own bathtub? This is before Cheri Johnson." Simmons argues that statutory aggravators must relate to the charged offense, just as victim impact evidence must relate to the charged offense.

Again, discussing the evidence presented regarding the murder of Leonora McClendon was proper. Further, the Missouri Supreme Court found this claim to be irrelevant because the jury found eight of the nine non-statutory aggravators - the murder of McClendon being the one non-statutory aggravator they did not find. Therefore, the eight non-statutory aggravators that the jury did find were sufficient to support the death penalty together with the statutory aggravator found. Simmons, 955 S.W.2d at 740. The Missouri Supreme Court's decision that the prosecutor's comment did not rise to the level of a due process violation was not contrary to or an unreasonable application of federal law. Relief on this basis must be denied.

Regarding the eleventh identified statement, Simmons claims the prosecution's closing statement that, "He must die, not for anything we have done here, but because of everything that he has chosen to do in his life", argued for the death sentence based upon Simmons' entire life and not limited to the specific offense. Simmons argues the prosecutors allegations were improper and did not relate solely the crime charged.

Again, relying on Payne, the Missouri Supreme Court has held that evidence of non-statutory aggravating circumstances is proper. Bucklew, 973 S.W.2d at 96. Therefore, evidence of the murder of Leonora McClendon, the assaults of Jane Davis and Michelle Aidridge, and the theft from Norma Whiteside was proper at this phase.

Therefore, the ruling of the Missouri Supreme Court was not contrary to, nor an unreasonable application of, federal law. The relief requested on this basis must be denied.

Next, Simmons argues that the prosecutor's statements concerning where he thought the trial would be at this point and about his own daughters was irrelevant argument and encouraged the jury to ignore the Taw, Simmons argues these statements improperly injected the prosecutor's personal beliefs into the penalty phase.

The first statement, "I was deadly serious about it then, because I felt in my heart of hearts this is where we'd be at, come the end of this trial", was not a commentary on the prosecutor' s personal feelings about the case, rather it was an argument that the evidence was sufficient to sentence Simmons to death. This is not improper argument and did not so fatally infect the sentencing process as to rise to the level of a due process violation.

The second statement to which Simmons objects does reflect an emotional reaction to the case being tried. With regard to his own daughters, the prosecutor said, "They're twenty-two and nineteen. And if someone would rip them out from my heart and from my community, you know, it would be difficult to follow the law."

Immediately following the prosecutor's comment about his own daughters, the prosecutor made the eighth remark identified, "Don't you think he's [Mr. Johnson] hoping and waiting for you to do what the law doesn't permit him to do, with Mr. Simmons having been given all the guarantees he needs to be given?" Simmons argues that this argument also improperly inflamed the passions of the jury.

The Court finds that the comment about the prosecutor's own daughter and the remark about Mr. Johnson's hopes were improper. They were improper because they were calculated to inflame the jury and. referenced self-defense in the context of a specific crime. After determining the comments to be improper, the Court must then examine the record to determine whether the comments had a decisive effect on the trial. Harris, 184 F.3d at 752.

The Eighth Circuit has held that isolated or ambiguous appeals to the juror's fears and emotions do not warrant.

habeas relief. Shurn v. Delo, 177 F.3d 662, 667 (8th Cir. 1999). Only a relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to remove reason and responsibility from the sentencing process, requires that a sentence of death be vacated. Id.

When considered as a whole, this argument did not subject the jury to the kind of relentless, focused, uncorrected argument based on fear that requires vacation of a petitioner's sentence. There was ample other evidence in the record supporting the jury's conclusion such that it is not a reasonable probability that the isolated reference changed the outcome of the sentencing proceeding. Consequently, the Missouri Supreme Court's denial of relief on this basis was not contrary to or an unreasonable application of established Supreme Court precedent. Habeas relief on this basis will be denied.

Simmons also claims that the fourth and ninth identified remarks were an attempt to appeal to the jurors' emotions. Simmons claims that the prosecutor's inference in the fourth challenged remark, that Simmons was to blame for social ills and the dangers faced by young single women, was improperly personalizing the case to the jury. The prosecutor stated, "he, people like him, have to be deterred from ripping our daughters or sisters or wives out of our community, out of our hearts, out of our lives."

A review of the prosecutor's statement regarding the safety of young women in the context of which the statement was made reveals that the statement was not an appeal to the emotions of the jury at all. The statement was made in response to defense counsel's assertion in his closing argument that life imprisonment is a way of deterring Simmons forever, and that the death penalty was not necessary. In response, the prosecutor made the challenged argument that life imprisonment would not deter Simmons forever and that "people like him" need to be deterred from hurting young women. The United States Supreme Court held

in Darden that where a challenged comment is invited by defense counsel's own closing, the responsive nature of the comment must be considered in determining the effect of the comment on the jury. Darden, 477 U.S. at 182. As previously observed, a prosecutor is entitled to a fair response when the defense attacks the Government's case. See Flynn, 196 F.3d at 930.

In light of the context in which the prosecutor made his comment about deterring "people like him" in order to protect young women, the Court does not find the comment was improper. Relief based on this challenged comment will be denied.

With regard to the ninth identified comment, Simmons claims that the prosecutor improperly argued that anyone would try to aid Johnson if possible and if too much force was used, that individual would have been justified In killing Simmons. The prosecutor remarked, "what person in this world if they had some means at their disposal, a gun, a baseball bat, something -- would not go to this woman's aid, and if it was necessary, bash him on the back of the head, you know, maybe say stop. . . and if you had to bash him hard enough to kill him, you would be justified, the person would be justified." Simmons argues this argument inflamed the passions and prejudices of the jury, it was irrelevant and it encouraged the jury to used emotion, not reason.

Again, these remarks may have been improper, but this argument did riot subject the jury to the kind of relentless, focused, uncorrected argument based on fear that requires vacation of a petitioner's sentence. There was ample other evidence in the record supporting the jury's conclusion such that these comments did not create a reasonable probability that the sentencing proceeding would have resulted differently. The Missouri Supreme Court's denial of relief on this basis was not contrary to or an unreasonable application of established Supreme Court precedent. Habeas relief on this basis will be denied.

The latter part of eighth identified comment which

refers to Simmons' "guarantees" is almost identical to the third comment about which Simmons complains. That comment compares Simmons' "exercise of his constitutional rights" with Johnson's inability to exercise her rights. The Court will analyze the comments regarding Simmons' "guarantees" and the "exercise of his constitutional rights" together.

These remarks may have been improper just as the prior appeals to the jurors' emotions were. But again, they did not rise to the level of a relentless, focused appeal to emotion that is necessary to warrant habeas relief. See Shurn, 177 F.3d at 667. Because the prosecutor's comments were not so prejudicial as to deprive Simmons of a fair trial, the Missouri Supreme Court's conclusion that no manifest injustice resulted from the prosecutor's statements is not contrary to or an. unreasonable application of established Supreme Court precedent. Habeas relief requested on this basis will be denied.

Simmons claims that the prosecutor misquoted Simmons as having called another woman a bitch in the fifth identified remark. Additionally, Simmons claims he described him as having a "bent or trait of character exhibited by a history of abuse toward women." Simmons argues these statements were inaccurate, misleading and should be condemned.

In his opening argument, the prosecutor stated that Simmons said "I'm going to kill you, Bitch!" when he came into Jane Davis' residence to assault her. The prosecutor then speculated that was what Simmons said to Cheri Johnson as he entered her apartment.

This comment identified by Simmons causes the Court greater concern than Simmons' other objections, although it too falls short of a due process violation. The first thing the Court must determine is whether the comment was improper. In making that determination, the Court is again mindful that as long as prosecutors do not stray from the evidence and reasonable inferences therefrom, they may use

colorful language in arguments to the jury. See Robinson, 110 F.3d 1320, 1327 (8th Cir. 1997). Applying this standard to the prosecutor's comment, there was evidence that Simmons called Jane Davis a bitch, but there was no evidence in the record concerning Simmons' use of that language with Johnson. The prosecutor appears to have strayed from the evidence adduced at trial. As a result, the Court finds that the comment was improper.

Having made a determination of impropriety, the Court must now consider the effect of the remark in light of the totality of the circumstances in which it was made. To prevail, Simmons must show that the argument so fatally infected the trial with unfairness that the conviction was a denial of due process. See Darden, 477 U.S. at 181.

Simmons fails this test because the weight of the evidence against him, while circumstantial, was strong. See this Court's prior discussion at Part I, Ground 4.A. Further, the trial court properly cautioned the jury that counsel's closing arguments were not evidence and that they were not to consider failure to testify.[11] When determining the effect of prosecutorial conduct upon the jury, the Court must presume that the jury followed the trial court's instructions in considering the evidence and reaching a verdict. See Romano

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[11]Instruction No. 16 given to the jury stated,

The attorneys will not have the opportunity of arguing the case to you. Their arguments
are intended to help you in understanding the evidence and applying the law, but they are
not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law is given in these instructions.

v. Oklahoma, 512 U.S. 1, 12-13 (1994).

The record does not support a finding that this argument so infected the trial with unfairness as to rise to the level of a due process violation. Consequently, the Missouri Supreme Court's denial of relief was not contrary to or an unreasonable application of established Supreme Court precedent. The relief requested on this basis will be denied.

With regard to the prosecutor's statement that Simmons had a "bent or trait of character exhibited by a history or abuse toward women", this was relevant to one of the non-statutory aggravating circumstances presented by the prosecutor. Therefore, it was entirely proper for him to reference it during his closing argument. Payne, 501 U.S. at 833 (Scalia, J., concurring). The Missouri Supreme Court's determination was not contrary to or an unreasonable application of federal law. Relief on this basis will be denied.

Simmons argues that the prosecutor's explanation the seventh identified comment that "ultimately, of course, if you cannot agree, the punishment is left up to the Judge" improperly misled the jury to believe that the responsibility of sentencing lay elsewhere. This comment was made during the prosecutor's rebuttal and the trial judge instructed the jury to disregard the prosecutor's attempted statement that Simmons could be released if not sentenced to death. The judge did not, however, declare a mistrial.

The Court must first determine whether the statement was improper. Under the Missouri death penalty scheme, when the jury is "unable to agree on punishment, the judge [becomes] the sentencer... ." Six v. Delo, 94 F.3d 469, 475 (8th Cir. 1996). This is not a denial of a petitioner's constitutional rights because in order for a jury to be deadlocked under the Missouri scheme, the jury must have unanimously found at least one statutory aggravating circumstance which makes the defendant eligible for the death penalty. Id.

Even if the remark had been improper, the prosecutor was not allowed to finish his statement. Simmons' defense

counsel objected before the prosecutor finished his argument and a discussion ensued at the bench, outside the presence and hearing of the jury. Although the judge denied Simmons' counsel's motion for mistrial, he instructed the jury to disregard the remark, and in Instruction No. 27, the judge clearly explained the law to the jury.

INSTRUCTION NO.27

> You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

When determining the effect of prosecutorial conduct upon the jury, the Court must presume that the jury followed the trial court's instructions in considering the evidence and reaching a verdict. See Romano, 512 U.S. at 12-13.

The record does not support a finding that the prosecutor's argument so infected the trial with unfairness as to rise to the level of a due process violation. Consequently, the Missouri Supreme Court's denial of relief was not contrary to or an unreasonable application of established Supreme Court precedent. The relief requested on this basis must be denied.

In sum, none of the identified arguments during the penalty phase of Simmons' trial so fatally infected the trial with unfairness as to constitute a due process violation. Consequently, the Missouri Supreme Court's decision to deny relief on those Issues was not contrary to or an unreasonable

application of established Supreme Court precedent. Relief on the grounds asserted will be denied.

D. Ineffective assistance of counsel for failing to object to those arguments of the prosecutor to which counsel did not object.

Simmons claims his trial counsel was ineffective for failing to object to most of these arguments and preserving them for appeal.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(l); Long, 184 F.3d at 759. The Court must then review the state court's determination of the issue and ensure that is was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

As discussed in section I, the controlling precedent for ineffective assistance of counsel claims is set forth in Strickland v. Washington, 466 U.S. 668 (1984).

The Missouri Supreme Court addressed these claims as follows:

> 2. Failure to Object to Voir Dire Comments
>
> Simmons presents for review several statements of the prosecutor made during voir dire and claims that his counsel was ineffective for failing to object to them. These statements include (1) repeatedly stating that the jury would provide a "recommendation" to the judge; (2) stating that all of the jury's guilt and penalty phase decisions have to be unanimous; (3) telling the jury that it could impose the death penalty if it thought or formed the personal opinion that death was appropriate and just; (4)

various statements of the prosecutor to the effect that he would prove everything he was supposed to and that he represented the State; (5) allegedly encouraging the jury to prejudge the case by discussing the penalty phase as if they would reach it; and (6) several statements that Simmons interprets as seeking a commitment 'from the jurors to vote a certain way.

After review of these statements, we conclude that, even if objectionable, there is no reasonable probability that the outcome of the trial would have been different had there been successful objections. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Therefore, counsel cannot be considered ineffective for failing to object. A particularized ineffective assistance of counsel analysis of each remotely objectionable statement made during the course of a trial would serve no purpose other than to encourage future litigants to micro-dissect the transcript, as has occurred here. We do not choose to encourage this type of appellate practice. See Brown, 902 S.W.2d at 300.

Simmons, 955 S.W.2d at 748.

3. Failure to Object to Remarks in Guilt Phase

During his guilt phase opening statement, the prosecutor stated that Simmons "deliberately, premeditatedly, after the lady pleaded with him, bludgeoned her to death . . ." Simmons contends that his counsel was ineffective for

failing to object to this statement. This lone remark during opening argument does not give rise to a reasonable probability that the outcome would have differed had defense counsel objected. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. No ineffective assistance is shown,

Simmons also complains of numerous statements during the prosecutor's guilt phase closing argument. Three of these statements were objected to, but Simmons asserts that his counsel was ineffective for failing to preserve them for appellate review because counsel did not include them in his motion for new trial: (1) that no evidence pointed to anyone but Simmons as the killer; (2) that the prosecutor hopes that Johnson was not alive during some of Simmons' brutal acts . . . . There was no objection to the remainder of the complained-of comments, and Simmons asserts ineffective assistance of counsel for failure to do so: (1) ruminating on Johnson's possible future; (2) saying, "[d]id you hear that he was not guilty? Did you hear that this evidence shows him innocent?"; (3) saying, "when the Judge ' tells you that on or about November 30th the defendant caused the death of Cheri Johnson by strangling and suffocating her—let's leave the defendant word out of there. . ."; (4) opining that if there was no deliberation in this case, then there is no deliberation in any murder; (5) complementing the police work; (6) commenting on Simmons' usual style with women and that Simmons "is a coldblooded lady killer";....

We have reviewed the foregoing guilt phase arguments and determine that counsel was either not deficient in failing to object or that no prejudice resulted from the failure to object. An extended analysis of each statement would offer no precedential value. The point is denied.

Simmons, 955 S.W.2d at 748.

6. Failure to Object to Penalty Phase Arguments

There was no objection to the remainder of the complained-of comments of the prosecutor, and Simmons asserts ineffective assistance of counsel for failure to do so: (1) saying he felt in his heart that the case would end up in penalty phase; (2) speaking of his daughters and stating that he would have difficulty following the law if they were murdered; (3) various comments referencing Simmons' constitutional rights and his exercising of his right to trial; (4) arguably personalizing the case to the jury by mentioning women, daughters, sisters and wives as those who should not have to fear people like Simmons; (5) arguing two points allegedly not supported by the evidence—what Simmons might have said to Johnson, and that Simmons has a history of abuse toward women; (6) saying that if there was no deliberation in the murder of Leonora McClendon, "there is no murder in this United States that could classify as deliberation then. I mean, there's not probably a worse horrible crime"; (7) telling the jury that if they do not

> decide on punishment. the judge will; (8) surmising that Johnson's father is "hoping and waiting" for the jury to do what he cannot; (9) arguing that the circumstances of the McClendon murder exhibited depravity of mind; (10) saying that Simmons deserved death for "everything that he has chosen to do in his life" and (11) making indirect references to cases from other jurisdictions.
>
> As with the guilt phase arguments, we have reviewed the foregoing penalty phase arguments and determine that counsel was either not deficient for failing to object or that no prejudice resulted 'from the failure to object. An extended analysis of each statement would offer no precedential value. The point is denied.

Simmons, 955 S.W.2d at 751.

It is clear from the Missouri Supreme Court's discussion that it applied the standard set forth in Strickland to Simmons' ineffective assistance of counsel claims. In light of this Court's lengthy discussion of each challenged prosecutorial comment, this Court agrees with the Missouri Supreme Court that the 'failure to object to the challenged comments was within the realm of reasonable trial strategy. The Missouri Supreme Court's conclusion was not contrary to or an unreasonable application of the Strickland standard. As such, Simmons' request for relief on this ground will be denied.

III. The trial court allowed the prosecution to present evidence regarding the murder of Leonora McClendon during the penalty phase of Simmons' trial for the murder of Cheri Johnson in violation of Simmons' Eighth and Fourteenth Amendment rights - Ground 3.

Simmons argues that evidence of Leonora McClendon's murder was improperly admitted during the penalty phase of the trial in violation of his Eighth and Fourteenth Amendment rights.

Simmons claims that the focus at the penalty phase on the McClendon murder and its impact on her family was overwhelming and severely prejudiced Simmons' case even though the jury did not find the McClendon murder to be an aggravating factor. Simmons believes that this information led the jury to sentence him to death based on the belief that they were stopping a serial killer rather than basing their decision on the penalty for the Johnson murder. Additionally, Simmons argues that although victim impact evidence is admissible at the penalty phase of trial, that evidence must relate to the offense for which the state is seeking death, not another offense.

Simmons further argues that because the McClendon case had not been tried at the time of the Johnson trial, evidence regarding that murder was irrelevant and highly prejudicial. The trial judge overruled Simmons' counsel's objection and allowed the prosecution to present evidence about the McClendon murder as a non-statutory aggravator and found no prejudice. Simmons claims the jury's decision to sentence Simmons to death was arbitrary, capricious and unreliable because the penalty phase included minimal evidence about the Johnson murder and consisted primarily of evidence of the McClendon murder and conduct for which Simmons was never charged which inflamed the jury's emotions.

This Court's habeas review begins by identifying the controlling United States
Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The Darden standard for determining a constitutional violation as a result of evidentiary error once again governs these arguments.

The United States Supreme Court set forth the guidelines regarding use of victim impact testimony in Payne v. Tennessee, 501 U.S. 808 (1991). In Payne, the Supreme Court held that the Eighth Amendment does not bar the admission of victim impact testimony in the penalty phase of a capital trial. Id. at 825. The Supreme Court reasoned that a capital defendant is entitled to submit mitigating evidence to remind the sentencing body of his humanity and individuality. Id. In order for the jury to assess meaningfully the defendant's moral, culpability and blameworthiness, the State may properly conclude that the jury should have before it at the sentencing phase evidence of the specific harm caused by the defendant. Id. "[V]ictim impact evidence. . . is designed to show.. . each victim's uniqueness", id. at 823, and "evidence about the victim and the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id. at 827. "In the event that victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825 (citing Darden, 477 U.S. at 179-83).

The Missouri Supreme Court addressed this claim as follows:

> Simmons also contends that victim impact evidence introduced concerning the effect of the murders on the families of Cheri Johnson and Leonora McClendon rendered the penalty phase fundamentally unfair, so as to violate his right to due process. See Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991); Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct.

> 2464, 247 1-72, 91. L.Ed.2d 144 (1986). He also contends that all victim impact evidence introduced in criminal penalty phases before the amendment to sec. 565.030.4, RSMo 1994, which authorizes victim impact evidence, violates Mo. Const. art, I, sec. 21 (cruel and unusual. punishment). Both contentions are frivolous.
>
> The victim impact evidence from Johnson's family occupies three pages out of a penalty phase transcript of two hundred and ninety-four pages. This type of testimony is authorized both by Payne, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720, and by sec. 565.030.4, RSMo 1994. The impact of this evidence does not possibly jeopardize Simmons' right to due process. The victim impact evidence concerning Leonora McClendon is rendered irrelevant because the jury declined to find the statutory aggravator of McClendon's murder. Additionally, Simmons' art. I, sec. 21 argument is simply incorrect; further, a statute would not be able to authorize victim impact evidence if it truly was contrary to the Missouri Constitution, which it is not. See Wise, 879 S.W.2d at 515-16. He was tried after the amendment to sec. 565.030.4, not before.

Simmons, 955 S.W.2d at 741.

The Missouri Supreme Court correctly identified the Payne standard as applicable to the challenged testimony. The Missouri Supreme Court's application of the Payne standard was also proper. The Missouri Supreme Court found that while the testimony was in fact victim impact evidence, it was admissible under Payne.

The law should not prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder. Payne, 501 U.S. at 825. The Missouri Supreme Court has previously held that non-statutory aggravating circumstances are proper victim impact evidence. State v. Bucklew, 973 S.W.2d 83, 96 (Mo. 1998). The court also held that this includes crimes the defendant has been charged with, but not yet convicted. Id. These holdings are supported by Payne. The United States Supreme Court held that "[u]nder the aegis of the Eighth Amendment, we have given the broadest latitude to the defendant to introduce relevant mitigating evidence reflecting on his individual personality, and the defendant's attorney may argue that evidence to the jury." Id. at 826-27. Justice Scalia, in his concurrence, stated that "[t]he Court correctly observes the injustice of requiring the exclusion of relevant aggravating evidence during capital sentencing, while requiring the admission of all relevant mitigating evidence," Id., at 833 (Scalia, J. concurring). Further, "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Id. at 827.

The victim impact evidence concerning Leonora McClendon was not improper. Rather, the evidence was relevant mitigating evidence admissible under Payne. Even if it had been improper victim impact evidence, its admission did not violate Simmons' right to due process. The evidence of Simmons' guilt was extensive. Further, the jury declined to find the non-statutory aggravator regarding the murder of Leonora McClendon.

Because the evidence, even if improper, did not so infect the trial with unfairness that it would have changed the verdict, there is no due process violation. The Missouri Supreme Court's decision on admission of the challenged testimony was neither contrary to nor an unreasonable application of, clearly established federal law regarding admission of victim impact testimony. Neither was it based

on an unreasonable determination of the facts. Simmons' request for habeas relief based on the admission of testimony will be denied)[12]

IV. The failure of the trial judge to recuse himself- Ground 5.

Simmons argues that the trial judge's bias deprived Simmons of his constitutional rights to due process, a fair and impartial trial and ultimately his right to be free from cruel and unusual punishment. Simmons claims that the bias developed because Judge Dierker presided over both of trials and is evidenced by Judge Dierker's comments in his sentencing order. Simmons points specifically to what he characterizes as Judge Dierker's consideration of Simmons' hypothetical future dangerousness.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable

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[12]Simmons also claims that photos of Johnson, while she was alive, which were shown to the jury were irrelevant since they had no relationship to any aggravating factor. The Missouri Supreme Court did not address this issue in Simmons' case. The Court did not find this claim in Simmons' appellate brief to the Missouri Supreme Court. Therefore, Simmons' claim regarding these photos is procedurally defaulted for failing to present it at each step of the judicial process in state courts. Jolly v. Gammon, 28 F.3d 51, 53 (8th Cir. 1994). Because Simmons did not show cause and actual prejudice or fundamental miscarriage of justice to overcome this procedural default in his habeas petition, the Court will not review this claim for federal habeas relief. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

application of the established Supreme Court precedent. Id.

The United States Supreme Court has stated that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555 (1994).

It is presumed that judges act with honesty and integrity and that judges will not undertake to preside over a trial in which they cannot be impartial. State v. Kinder, 942 S.W.2d 313, 321 (Mo. bane 1977) (citing Winthrow v. Larkin, 421 U.S. 35, 47 (1975)). That presumption is overcome, and disqualification of a judge is required, however, if a reasonable person, giving due regard to that presumption, would find an appearance of impropriety and doubt the impartiality of the Court. Id. at 321.

The Missouri Supreme Court considered Simmons' claim as follows:

> Simmons argues that the motion court clearly erred in denying his motion to disqualify the judge, who presided over the underlying trial, from presiding over the Rule 29.15 proceeding. His grounds for disqualification were the judge's alleged bias and the judge's alleged status as a potential witness to some of the Rule 29.15 claims. A disqualifying bias arises if a reasonable person would find an appearance of impropriety and doubt the impartiality of the court. Kinder, 942 S.W.2d at 321. To support his claim of bias, Simmons again points to the sentencing order entered. by the judge on September 30, 1994, for the murders of Leonora McClendon and Cheri Johnson. Specifically Simmons alleges that

the Ted Bundy reference, quoted above in Point II.F, and the following paragraphs of the order reveal bias:

> The Court, . . . agreeing wholeheartedly with the sentence recommended by each jury, will deny the motions for judgment of acquittal or new trial and sentence Simmons accordingly...
>
> Upon review of the law and the record, the Court is convinced beyond doubt that each jury's assessment of punishment on the counts in this case is fair, just, reasonable and in accordance with the law. Without wishing to turn a deaf ear in advance to any plea for mercy at allocution, the Court is bound to say that the defendant richly deserved the supreme penalty in this case, The murder of Leonora McClendon was particularly brutal and repulsive, and defendant's future on death row is not likely to be any more agonizing than Leonora McClendon's death agony in the bathtub following defendant's ministrations; and his end, when it finally comes

> after the wheels of justice have ground slowly and exceedingly fine, will be merciful in comparison...

Simmons argues in a conclusory fashion that these comments would cause a reasonable onlooker to conclude that the judge was prejudiced, without any attempt to identify the particular bias these comments allegedly reveal. We can see no bias revealed in the above paragraphs that would cause a reasonable onlooker to question the judge's ability to impartially consider Simmons' Rule 29.15 motion. The comments properly express reasons for agreeing with the jury's recommendation of the death sentence for both murders.

Simmons also complains that the following statement contained in the, Rule 29.15 judgment reveals bias:

> The Court was convinced after the jury's verdicts in 1994 that Willie Simmons murdered both women; the Court remains convinced, and reiterates its finding beyond a reasonable doubt that Simmons is in fact guilty of both crimes.

The judge's continued belief after the postconviction hearing that Simmons was guilty does not impinge upon his ability to impartially consider Simmons' Rule 29.15

> claims. In what appears to be an additional allegation of bias, Simmons argues that the judge could not fairly judge Simmons' Rule 29.15 claims of incompetency because the judge would be justifying his failure before trial to order a court-ordered mental exam. An interest in upholding trial court actions, though, is not a disqualifying bias. Wise, 879 S.W.2d at 523. Simmons' allegations of bias lack any merit.

Simmons, 955 S.W.2d at 744.

Simmons argues that "Judge Dierker impermissibly based his sentencing decision on the facts of both the Johnson and McClendon cases and his belief that [Simmons] was culpable for both offenses." As a result, Simmons argues that Judge Dierker was required to disqualify himself from the sentencing and post-trial motions.

This Court agrees that Judge Dierker was not required to recuse himself just because he presided over both murder trials.

Judge Dierker presided over Simmons' trial for the murder of Cheri Johnson from June 6, 1994 to June 20, 1994. Judge Dierker presided over Simmons' trial for the murder of Leonora McClendon from July 25, 1994 to August 6, 1994. On June 20, 1994, a jury found Simmons guilty for the murder of Cheri Johnson and recommended a sentence of death. On August 6, 1994, a different jury found Simmons guilty of the murder of Leonora McClendon and recommended a sentence of death.

Based on the two jury verdicts, Judge Dierker's only decision under Missouri Supreme Court Rule 29.05 was to either accept the jury's verdict or reduce it to life imprisonment.

On September 30, 1994, Judge Dierker affirmed the juries' decisions and imposed the death sentence. Simmons

specifically points out Judge Dierker's comparison of Simmons to Ted Bundy as evidence of Judge Dierker's bias and his impermissible reliance on both murders and a. hypothetical fear of future dangerousness in sentencing Simmons. In addition to the portions of the September 30, 1994 order quoted above, Judge Dierker stated in his order that:

> Willie Simmons was fairly well embarked upon a career which might have rivaled that of the infamous Ted Bundy, but for a sharp-eyed detective, who noticed a florists distinctive wrapping paper in the apartment of one of the victims and a narcissistic propensity to appear in his own photographs.

Simmons correctly argues that his sentence should be particular to his crime and not the result of some future hypothetical conduct Newlon v. Armontrout, 885 F.2d 1328, 1336 (8th Cir. 1989) (prosecutor's remarks, including one which attempted to link the defendant with several well-known mass murderers, were found to be improper).

However, as Judge Dierker pointed out when responding to this argument in Simmons' 29.15 motion:

> Taken in context, the Court's reference to Simmons' criminal history as that of an incipient Ted Bundy is not so much a finding concerning Simmons, as it is hyperbole in praise of Detective Maler's police work. in or out of context, the reference betrays no ability to render fair judgment, since the career of Willie Simmons at the time the Court wrote its memorandum in September, 1994, included killing two women, assaulting three others, and threatening a female witness

> against him. The Court does nothing more than observe that this career "might well have rivaled" that of Bundy, had not good police work. . . led to his arrest and conviction.

The Missouri Supreme Court accepted Judge Dierker's explanation for his Ted Bundy reference as a reflection on good police work and not a conclusion or consideration about Simmons' hypothetical future dangerousness underlying his sentencing decision.

Simmons also claims that Judge Dierker should have recused himself because he was a potential witness in the 29.15 proceeding. The Missouri Supreme Court analyzed that claim as follows:

> As to the allegation that the judge should have been disqualified because of potential witness status, the only Rule 29.15 claim identified by Simmons as requiring the judge to be a witness is his claim that judges are assigned to death cases in St. Louis City based on their views on the death penalty. Simmons has failed to assert a compelling reason to have called the judge as a witness to support this claim at the postconviction hearing. [sic] The judge did not clearly err in denying the motion to disqualify.

Simmons, 955 S.W.2d at 744-45.

This Court again agrees with the Missouri Supreme Court that Simmons' claim that Judge Dierker was a potential witness is unsupported.

Finally, Simmons challenges Judge Dierker's failure to recuse himself from the hearings on the post-trial motions. Simmons' allegations of bias, based on the same facts asserted in support of recusal from sentencing, are conclusory

in nature and ring hollow. These claims fail for the same reasons set out earlier.

As stated above, the Missouri Supreme Court observed, "the judge's continued belief after the postconviction hearing that Simmons was guilty does not impinge upon [the judge's] ability to impartially consider Simmons' Rule 29.15 claims." Simmons, 955 S.W.2d at 744. This Court's review of the record brings it to the same conclusion.

Simmons also claims that his counsel was ineffective for failing to object to Judge Dierker's comments during voir dire that the jury compare the process to a game, that it should be sped along and that the jury would not enjoy their service in this case.

The Missouri Supreme Court addressed this claim as follows:

> Simmons also recites statements of the trial judge during voir dire and labels them objectionable. These statements intimated that the jurors would not enjoy their service, were paid by the taxpayers, and that the process of criminal prosecutions was like a game, and should be speeded along. Apparently, Simmons' conclusion is that these statements induced the jurors to hasten their decisions at the end of the guilt and/or penalty phases and not properly consider the evidence. Simmons offers no evidence to support that conclusion, and we do not share it. There was no ineffective assistance for not objecting.

Simmons, 955 S.W.2d at 748.

Under Strickland, counsel's failure to object must be prejudicial to amount to ineffective assistance. 466 U.S. at 692. His performance must have deprived Simmons of a fair

trial and the result of the trial would have been different but for counsel's substandard performance. Id. at 694. Judge Dierker's comments were not left uncorrected, even if found to be improper. Further, Simmons has not shown that the outcome of his trial would have been different had his counsel objected.

This Court is unable to find that the Missouri Supreme Court's conclusion was unreasonable.

Therefore, the Missouri Supreme Court's determinations as to whether the trial judge's failure to recuse himself and whether Simmons' counsel was ineffective are not contrary to nor unreasonable applications of established United States Supreme Court precedent. The relief requested will be denied.

V. The prosecution presented statutory and non-statutory aggravators that were unsupported by the evidence in violation of Simmons' Fifth, Eighth and Fourteenth Amendment rights - Ground 6.

A. Unconstitutional Statutory Aggravators

Simmons argues that the language of the aggravating circumstances presented to the jury in Instruction No, 20 during the sentencing phase of his trial was unconstitutional because it did not narrow the class of persons eligible for the death penalty and reasonably justify imposition of a harsher sentence on Simmons compared to others found guilty of murder.

This Court's habeas review begins by identifying the controlling United States
Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The United States Supreme Court has stated that in order to comport with the requirements of the Eighth and Fourteenth Amendments, a capital sentencing scheme must minimize the risk of wholly arbitrary and capricious action by the sentencer. Arave v. Creech, 507 U.S. 463, 470 (1993). The State must "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Id., at 471 (quoting Lewis v. Jeffers, 497 U.S. 764 (1990)). Those aggravating circumstances given to the jury for consideration must, therefore, genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Id. Aggravating circumstances fail to meet this standard when a person of ordinary sensibility could find that almost every murder fit the stated criteria. Zant v. Stephens, 462 U.S. 862, 878 (1983) (citing Godfrey v. Georgia, 466 U.S. 420, 428-29 (1980)).

The challenged language in Instruction No. 20 read as follows:

INSTRUCTION NO.20

> In determining the punishment to be assessed against the defendant for the murder of Cheri Johnson, you must first unanimously determine whether one or more of the following aggravating circumstances exists:
>
> 1. Whether the defendant murdered Cheri Johnson for the purpose of the defendant receiving money or any other thing of monetary value from Cheri Johnson.
>
> 2. Whether the murder of Cheri Johnson

involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find

a. That the defendant inflicted physical pain or emotional suffering on Cheri Johnson and that the defendant did so for the purpose of making her suffer before dying;

b. That the defendant killed Cheri Johnson after she was rendered helpless by the defendant and that the defendant thereby exhibited a callous disregard for the sanctity of all human life;

c. That the defendant committed repeated and excessive acts of physical abuse upon Cheri Johnson, and that the killing was therefore unreasonably brutal.

3. Whether Cheri Johnson was a potential witness in a pending investigation, namely the forcible taking of her jewelry and the assault upon her person on November 30, 1987 and was killed as a result of her status as a potential witness

Simmons, 955 S.W.2d at 741.

The Missouri Supreme Court considered the claim as follows:

This Court has repeatedly held, though, that the limiting provisions set out in Instruction No. 20, 2(a), (b), and (c) above, satisfy any vagueness concerns and that the aggravator

is not constitutionally infirm. State v. Harris, 870 S.W.2d 798, 813 (Mo. bane 1994).

Id. at 742.

This Court agrees with the Missouri Supreme Court that the language of Instruction No. 20 is not impermissibly vague. The language of paragraph 2(a), (b), and (c) would not make all murders subject to the death penalty. All murders do not involve the torturous characteristics described in the instruction. The language of Instruction No. 20 therefore narrows the class of person eligible for the death penalty and complies with the holding of Zant.

The Missouri Supreme Court's determination was not contrary to or an unreasonable application of Supreme Court precedent. Habeas relief on this basis will be denied.

B. Unconstitutional Non-Statutory Aggravators

Simmons also argues that the language in Instruction No. 21 was unconstitutional because it instructed the jury that they could consider Simmons' prior bad acts some of which were minor criminal infractions and some of which had not resulted in criminal charges against him. The Court notes that evidence of all the "bad" acts had been elicited at trial.

This Court's habeas review begins by identifying the controlling United States
Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The Supreme Court has held that statutory aggravating circumstances play a necessary function by circumscribing the class of persons eligible for a death sentence. Zant, 462 U.S. at 878. Their constitutional necessity does not, however, require the jury to ignore other

possible non-statutory aggravating factors in the process of determining which defendants, from among those who are eligible, will receive a death sentence. Id. States are free to determine the types of evidence, or non-statutory aggravating circumstances that juror's may consider in making their sentencing decision as a matter of state law. Id.

INSTRUCTION NO.21

If you have found beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 20 exists, then, in determining the punishment to be assessed against the defendant for the murder of Cheri Johnson, you may also consider:

1. Whether the defendant pled guilty to Fraudulent Use of a Credit Device on May 31, 1984, in the Circuit Court of the City of St. Louis, State of Missouri.

2. Whether the defendant pled guilty to Passing a Bad Check: No Account on December 8, 1986, in the Circuit Court of the City of St. Louis, State of Missouri.

3. Whether the defendant pled guilty to Assault Third Degree of Stephen Davis on April 14, 1987, in the Circuit Court of the City of St. Louis, State of Missouri.

4. Whether the defendant pled guilty to Assault Third Degree of Jane Davis on April 14, 1987, in the Circuit Court of the City of St. Louis, State of Missouri.

5. Whether the defendant pled guilty to Trespass in the First Degree on April 14, 1987, in the Circuit Court of the City of St. Louis, State of Missouri.

6. Whether the defendant murdered Leonora [sic] McClendon as submitted in Instruction No. 22.

7. Whether the defendant stole the motor vehicle of Norma Whiteside as submitted in Instruction No. 23.

8. Whether the defendant assaulted Michelle Aldridge as submitted in Instruction No. 24.

9. Whether the defendant has a bent or trait of character exhibited by a history of physical abuse toward women. . .

Simmons, 955 S.W.2d at 74 1-42.

The Missouri Supreme Court considered the claim as follows:

> Simmons complains variously that his prior convictions were improperly explored in detail during the penalty phase of the trial and that prior acts for which he had not been convicted were introduced as evidence of his character and as nonstatutory aggravators. As a general proposition., however, the facts and circumstances surrounding prior convictions, not just the existence of those convictions, may be introduced during the penalty phase. State v. Whitfield, 837

> S.W.2d 503, 511-12 (Mo. bane 1992); State v. Debler, 856 S.W.2d 641, 657 (Mo. bane 1993). The trial court has discretion to control the evidence concerning these circumstances. Whitfield, 837 S.W.2d at 512. In addition, prior unadjudicated criminal conduct may properly be heard by a jury during the penalty phase at trial. State v. Petary, 781 S.W.2d 534, 539 (Mo. bane 1989). We perceive no abuse of discretion by the trial court in its management of the evidence presented during the penalty phase of Simmons' prior crimes or unadjudicated criminal conduct.
>
> Unlike statutory aggravators, however, nonstatutory aggravators are not designed to narrow the class of those eligible for death. Nonstatutory aggravators, however, perform no function in the "eligibility" stage of capital sentencing; they are simply an incomplete list of facts relevant to whether or not the defendant should be sentenced to death at the "selection" stage. See State v. Brown, 902 S.W.2d 278, 293 (Mo. bane 1995) (holding that a nonstatutory aggravator's duplication of facts from a statutory aggravator was harmless error, if error at all).

Simmons, 955 S.W.2d at 740-42.

Simmons contends that paragraphs 1 and 2 of Instruction No. 21 instruct the jury that they could consider Simmons' prior bad acts which were minor criminal infractions. Federal law vests the determination of what type of evidence the jury may consider in the sentencing phase in the states. As long as the narrowing requirements of Zant

are met, which they were in this case, consideration of other evidence in the sentencing phase does not implicate the United States Constitution. Missouri has determined that character evidence is only a type of evidence which the jury may consider in determining its recommended sentence. State v. Debler, 856 S.W.2d 641, 656 (Mo. bane 1993).

Simmons contends that paragraph 9 does not comply with Zant because the language allows the jury to consider using one series of events to satisfy more than one aggravating factor.

Simmons misconstrues the Supreme Court's holding in Zant. Zant does not stand for the proposition that the aggravating circumstances must be limited such that the defendant's conduct cannot be used to satisfy more than one aggravating circumstance. Rather, as previously stated, Zant stands for the proposition that the aggravating circumstances must be limited such that the defendant's conduct which justified a sentence of death is distinguishable from the conduct of other defendants whose conduct did not warrant the death sentence. Simply put, Zant requires that the aggravating circumstance not be so broad that anyone committing first degree murder would be eligible to receive the death sentence. See Zant, 462 U.S. at 877.

The Missouri Supreme Court's determination on the non-statutory aggravator issue in this case again was consistent with both state and federal law. Relief will be denied on this point.

1. Double Jeopardy and Collateral Estoppel

Simmons further argues that paragraphs I and 2 were barred by the Double Jeopardy Clause and collateral estoppel because the jury found neither of these non-statutory aggravators at his 1989 trial.

The jury in Simmons' 1989 trial returned a recommended sentence of death. In support of the death sentence, the 1989 jury listed the aggravators they had

found beyond a reasonable doubt. The jury did not list paragraphs I or 2 as aggravators that they had found beyond a reasonable doubt.

Simmons argues that the 1989 jury's failure to rely on these aggravators to justify the death sentence for Cheri Johnson's murder operates as an acquittal of the charges in paragraphs I and 2. Simmons argues he was acquitted of the charges because the 1989 jury necessarily found that the government had not proven Simmons' guilt beyond a reasonable doubt or it would have relied upon these charges as aggravating circumstances.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The United States Supreme Court set forth the controlling precedent on this claim in Poland v. Arizona, 476 U.S. 147 (1986). In Poland, the Court held that the penalty phase of a trial seeking the death penalty is not a "set of minitrials on the existence of each aggravating circumstance" proffered by the prosecution. Poland, 476 U.S. at 156. Rather,

> 'on the merits' of a capital proceeding, the 'central.1 issue [is] whether death was the appropriate punishment for the offense. Thus, the 'offense' for which the defendant receives his 'conviction' or 'acquittal' is that of the appropriateness of the death penalty, not the elements of any particular aggravating factor.'

Poland, 476 U.S. 147, 160 (citing Arizona v. Rumsey, 467 U.S. 203,211(1984)). With regard to Simmons' collateral

estoppel claims, the United States Supreme Court has held that collateral estoppel or issue preclusion exists where an issue of ultimate fact is finally determined by the trier of fact. Ashe v. Swenson, 397 U.S. 436 (1970). Following the Supreme Court's Poland decision, a jury's decision not to rely on any specific aggravating circumstance in support of its verdict is not a *final* determination of that issue. Poland, 476 U.S. at 160. Collateral estoppel will not bar a later trial on the underlying charge which may have been submitted as an aggravating circumstance in the death penalty phase of the 1989 murder trial.

The Missouri Supreme Court determined Simmons' claim as follows:

> As a general proposition, collateral estoppel bars relitigation of a specific fact or issue that was unambiguously determined by a previous jury. State v. Nunley, 923 S.W.2d 911, 922 (Mo. bane 1996). Its import in the criminal context is that if a jury has decided an "ultimate fact," that fact is barred from relitigation. Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970). The jury's decision, however, must be distilled to a specific, unambiguous, and necessary finding of one particular fact, or finding on one specific issue, for that fact or issue to be barred from relitigation. See Nunley, 923 S.W.2d at 922; State v. Johnson, 598 S.W,2d 123, 125-26 (Mo. bane 1980); State v. Booker, 540 S.W.2d 90, 93 (Mo. App. 1976) (noting that because it is usually impossible to discern a specific basis upon which a jury reaches its verdict, collateral estoppel will rarely be available in a criminal context).

> In the first trial, the jury's failure to find the particular nonstatutory aggravating circumstances were not "findings" at all, but rather a lack of them, and the Ashe rationale does not even apply. A jury is not called on to make a specific finding one way or the other, such as guilty or not guilty, or "yes" the aggravator has been proved or "no" the aggravator has not been proved. Instead, a jury is instructed merely to list on the verdict form those aggravators that it has, in fact, found, and there is not specific requirement that a finding be made that the other proposed aggravators were not found. See MAI-CR3d 313.48B; MAI-CR3d 313.58B1.A.
>
> Moreover, the failure to make a finding does not necessarily mean that the aggravator was not proved. A jury is instructed three times to determine whether "one or more" aggravating circumstances exist before it can deliberate on the death penalty. MAI-CR3d 313.41B; MAI-CR3d 313.42B; MAI-CR3d313.38B. Once a jury finds that one or more aggravators exist, as it did in the first case, it is unnecessary for it to pass on the other proposed aggravators. A particular aggravator, for instance, may be avoided because it is more difficult to judge, even though with further review, a jury might well decide that adequate proof was made on that particular aggravator. For these reasons, collateral estoppel does not apply.

Simmons, 955 S.W.2d at 742-43.

The Missouri Supreme Court properly identified Poland and Ashe as the controlling precedent on Simmons'

double jeopardy and collateral estoppel claims. Further, the Missouri Supreme Court properly applied those holdings to the claims before it. The Missouri Supreme Court's determination of Simmons' double jeopardy and collateral estoppel claims was not contrary to or an unreasonable application of established United States Supreme Court precedent. The relief requested will be denied.

VI. Simmons' Fourteenth Amendment right to Due Process was violated because the jury's consideration of mitigating evidence was limited - Ground 7.

Simmons claims that penalty phase Instruction No. 26 erroneously stated that the jury "may consider" rather than "must consider" the listed mitigating factors when determining whether to impose the death penalty. The instruction is as follows:

> INSTRUCTION NO.26
>
> If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 20, each of you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Cheri Johnson.
>
> You may also consider:
>
> 1. The age of Willie Simmons at the time of the offense.

2. Whether Willie Simmons has family' who care about him and are desirous of

> maintaining a relationship with him, and would feel grief at his loss.
>
> You may also consider any circumstances which you find from the evidence in mitigation of punishment.
>
> It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstance or circumstances found to exist, then you must return a verdict fixing the defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

Simmons argues that a "sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." Simmons claims that this instruction allowed the jury to ignore the mitigating factors presented in violation of his due process rights, as well as the Fifth, Sixth and Eighth Amendments. Simmons argues that a sentencer in a capital case must be allowed to consider as a mitigator any evidence proffered to support a life sentence.

This Court's habeas review begins by identifying the controlling United States
Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The Eighth Circuit has repeatedly upheld the use of this mitigating circumstance instruction. In Reese v. Delo 94 F.3d 1171, 1186(8th Cir 1996), cert. denied, 520 U.S. 1257 (1997) (citing Skipper v. South Carolina, 476 U.S. 1(1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); and Lockett v. Ohio, 438 U.S. 586 (1978)), the court stated that "'[m]ay consider' signified that the jury is given discretion as to what weight the mitigating evidence should receive." Further, the instructions were proper "because after the jury found the existence of an aggravating circumstance, the jury was not required to impose the death penalty even if the jury found no mitigating evidence." Ramsey v. Bowersox, 149 F.3d 749, 757 (8th Cir. 1998).

The Missouri Supreme Court addressed this claim as follows:

> Simmons argues that the mitigating circumstances instruction, which instructs the jury that they "must" determine whether there are mitigating circumstances and continues on to list specific items which they "may" consider, misstates the law. This claim has been repeatedly rejected. State v. Copeland, 928 S.W.2d 828, 853 (Mo. bane 1996). We do so yet again.

Simmons, 955 S.W.2d at 743.

The Eighth Circuit has repeatedly upheld the language of Instruction No. 26 as constitutional. The Missouri Supreme Court's decision to reject this claim once again was not contrary to nor an unreasonable application of federal law. This Court will not grant habeas relief on this ground.

VII. Inadequate Proportionality Review - Ground 8.

Simmons argues that the Missouri Supreme Court's proportionality review violated his Eighth Amendment and due process rights. Specifically, Simmons argues that the state court's reference to factually similar cases, all of which resulted in death sentences, was less equitable than a "frequency analysis", in which the court would have compared Simmons' case with comparable cases to determine how often the death penalty has been imposed in like cases, and whether a sentence of death was justified in this case.

Simmons also complains that death sentences are arbitrarily and capriciously imposed because the State has unrestricted prosecutorial discretion. Finally, Simmons argues that the State has no legitimate government interest in sentencing him to death.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The United States Supreme Court has held that proportionality review by a state appellate court is not required by the Constitution. McCleskey v. Kemp, 481 U.S. 279, 306; Pulley v. Harris, 465 U.S. 37, 43 (1984). "While the review is not mandated by the federal Constitution, once in place it must be conducted consistently with the Due Process Clause." Kilgore v. Bowersox, 124 F.3d 985, 995 (8th Cir. 1997). Under Eighth Circuit law, the requirements of due process are met by Missouri's statutory notice that a proportionality review of death sentences will be performed on direct appeal, See Mo. Rev. Stat. § 565.0 14(3)(3) (1994), and by a performance of that review by the Missouri Supreme Court, with a conclusion that the penalty was not disproportionate to that imposed in similar cases. LaRette v. Delo, 44 F.3d 681, 688 (8th Cir. 1995). A

federal habeas court's finding that the Missouri Supreme Court has "addressed and decided the proportionality issue in its opinion" ends the inquiry of the federal court. Zeitvogel v. Delo, 84 F.3d 276, 283 (8th Cir. 1996). "The Constitution does not require [the Court] to look behind [the state court's proportionality] conclusion to consider the manner in which the court conducted its review or whether the court misinterpreted the Missouri statute." Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir. 1997) (citing Walton v. Arizona, 497 U.S. 693, 656 (1990); See also Tokar v. Bowersox, 198 F.3d 1039, 1051 (8th Cir. 1999); Ramsey v. Bowersox, 149 F.3d 749, 754 (8th Cir. 1998).

The Missouri Supreme Court addressed this claim as follows:

> Under sec. 565.035, RSMo 1994, this Court is required to review the proportionality of the sentence of death imposed in this case. There is no evidence in the record before us that the jury or judge imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Further, the statutory aggravating circumstance found by the jury, namely that the murder of Cheri Johnson involved depravity of mind, and was outrageously and wantonly vile, horrible, and inhuman, is amply supported by the evidence.
>
> The death sentence in this case also is neither excessive nor disproportionate to the penalty imposed in similar cases. Johnson had been savagely beaten and strangled for four to five minutes before she died. The restraining necktie remained around her neck. Death by strangulation, after beating or other serious wounding of the victim, has

> supported previous death sentences. See State v. Kreutzer, 928 S.W.2d 854, 860 (Mo. bane 1996); State v. Stokes, 638 S.W.2d 715, 7 17-18 (Mo. banc 1982). Simmons' previous actions, assaulting other women and murdering Leonora McClendon, exhibited a pattern of crime, further supporting the imposition of the death sentence. See Rodden, 728 S.W.2d 212, 222 (Mo. banc 1987).

Simmons, 955 S.W.2d at 75 1-52.

It is clear that the Missouri Supreme Court, performed its proportionality review consistent with the Missouri statue regarding such reviews. The Missouri Supreme Court cited cases to which it compared Simmons' case, and found that Simmons' death sentence was not disproportionate. This Court may not further review Simmons' claim.

The Missouri Supreme Court found Simmons' complaint regarding the prosecutor's unrestricted discretion to be "frivolous, unreasonable and without foundation." Simmons, 955 S.W.2d at. 745. Under Mo. Rev. Stat. § 565.035.3(3), the Missouri Supreme Court is the entity required to determine whether the sentence is excessive or disproportionate, not the State's prosecution. This Court cannot find that this was an unreasonable determination by the court since prosecutorial discretion is irrelevant to proportionality review.

With regard to Simmons' claim that the government has no legitimate interest in sentencing him to death, the United States Supreme Court has stated that the State has a legitimate interest in the manner in which punishment for crimes committed is imposed so as not to violate any individual's Eighth Amendment right. Payne, 501 U.S. at 824-25.

The Missouri Supreme Court's determinations of

Simmons' proportionality claim were not contrary to or an unreasonable application of United States Supreme Court precedent. As such, the relief requested on this ground will be denied.

VIII. During voir dire, Simmons' Eighth and Fourteenth Amendment rights were violated due to a Batson violation when the prosecution used his peremptory challenge in a racially-discriminatory way - Ground 9.

Simmons claims that the prosecutor's reasons for his peremptory challenge were pretextual and racially motivated violating his Eighth and Fourteenth Amendment rights.

This Court's habeas review begins by identifying the controlling United States
Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The United States Supreme Court "has made clear that the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." Batson v. Kentucky, 476 U.S. 79, 88 (1986). "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." Id. at 89.

In order to bring a Batson challenge, the defendant must first make a prima facie showing that he is a member of a cognizable racial group and that the prosecutor used peremptory challenged to exclude potential jurors of the defendant's race. Id. at 96. The defendant must then demonstrate that the "totality of the relevant facts give rise to an inference of discriminatory purpose." Id. at 94. The burden then shifts to the State who must provide a "neutral explanation for challenging black jurors." Batson, 476 U.S. at 97. The defendant next has the "opportunity to argue that

the prosecutor's facially neutral explanations were merely a pretext for discrimination." Jones v. Jones, 938 F.2d 838, 844 (8th. Cir. 1991); See also Elem v. Purkett, 64 F.3d 1195, 1200-01(8th Cir. 1995).

The prosecutor's motivation for striking a juror presents a question of fact. In habeas proceedings, the reviewing federal court presumes that correctness of state court findings of fact and may not set them aside, absent procedural error, only if they lack adequate support in the record. Shurn v. Delo, 177 F.3d 662, 664 (8th Cir. 1999).

Simmons complains that the prosecutor's stated reasons for striking Ramona Brown, an African-American woman, were not case-specific, race-neutral explanations, but were pretextual and racially-motivated violating the Eighth and Fourteenth Amendments. The prosecutor stated she was indecisive, she seemed to have a bad attitude about serving on the jury, and she seemed weak on the death penalty. In addition, the prosecution noted that she worked for the downtown post office which the prosecutor explained that he had poor results from other jurors in other cases who worked there. Simmons claims that it is well known in this jurisdiction that the prosecutor's excuse that Brown worked for the post office is pretext for racial discrimination. Simmons further claims that the prosecutor incorrectly states Brown's views and, therefore, his reasons were pretextual.

The trial judge found that these were not pretextual, racially-motivated reasons. The State struck seven black venirepersons and four white venirepersons. The defense struck nine white venirepersons and two black venirepersons.

Judge Dierker made a factual determination that the prosecutor's reasons for striking Ms. Brown were not pretextual, racially motivated reasons. The Missouri Supreme Court affirmed Judge Dierker's Batson ruling stating:

> After Simmons challenged the prosecutor's strike of the particular venireperson, the prosecutor offered several race-neutral reasons for striking her: she was perceptibly weak on the death penalty, she was agitated or perturbed to be at voir dire, and she was an employee of the post office, an occupation with which the prosecutor claimed he had had poor results on juries. After Simmons argues that these reasons were merely pretextual, the trial court denied his challenge. This decision will be overturned only if it is clearly erroneous. The reasons put forth by the prosecutor are sufficiently race-neutral and nonpretextual to allow us to conclude that the trial court did not clearly err in denying Simmons' Batson. challenge. This point is rejected.

Simmons, 955 S.W.2d at 736-37 (internal citations omitted).

This Court's review of the transcript supports the findings of the state court. As such, the Missouri Supreme Court's finding was not contrary to or an unreasonable application of United States Supreme Court precedent. Habeas relief will not be granted on this basis.

IX. Unconstitutional Reasonable Doubt Instruction - Ground 10.

Simmons claims that the definition of reasonable doubt given to the jury violated his due process rights. Specifically, Simmons argues that the instruction equated "reasonable doubt" with being "firmly convinced" of Simmons' guilt. Simmons claims the jury could have interpreted the instructions to require a degree of proof less than that required by law.

This Court's habeas review begins by identifying the controlling United States
Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759.The Court must then review the state court's determination of the issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The United States Supreme Court has determined that while the Constitution does not require that any particular form of words be used to advise the jury of the government's burden of proof, the instructions taken as a whole must correctly convey the concept of reasonable doubt to the jury. Victor v. Nebraska, 511 U.S. 1, 5 (1994). The Eighth Circuit reviewed Missouri's reasonable doubt instruction in light of the Victor standard in Ramsey v. Bowersox, 149 F.3d 749, 757 (8th Cir. 1998). In Ramsey, the court held:

> Ramsey complains that the instructions defined proof "beyond a reasonable doubt" as that leaving the jury "firmly convinced" of Ramsey's guilt. We have already decided we would have to go beyond existing Supreme Court precedent to find constitutional infirmity in Missouri's instruction charging the jury to be "firmly convinced" before convicting a defendant. Murray v. Delo, 34 F.3d 1367, 1382 (8th Cir. 1994). Thus, we have held this challenge to Missouri's reasonable doubt instruction is barred by Teague v. Lane, 489 U.S. 288 (1989); see Murray, 34 F.3d at 1382; Reese v. Delo, 94 F.3d 1177, 1186 (8th Cir. 1996), cert. denied, 520 U.S. 1257 (1997). Also, Justice Ginsburg has indicated her approval of an instruction proposed by the Federal Judiciary Center that defines

> proof beyond a reasonable doubt as leaving a juror firmly convinced. See Victor v. Nebraska, 511 U.S. 1, 26-27 (1994) (Ginsburg, J., concurring).

Ramsey, 149 F.3d at 757.

The Missouri Supreme Court summarily rejected Simmons' claim as "frivolous, unreasonable and without foundation." Simmons, 955 S.\V.2d at 745. The court further stated that this claim had been "firmly and uniformly rejected by previous decision of this Court and the federal courts." Id.

The Missouri Supreme Court's determination was not contrary to or an. unreasonable application of United States Supreme Court precedent. Rather, this conclusion is supported. by the Eighth Circuit's finding in Ramsey and Murray. The relief requested on this ground will be denied.

X. Penalty Phase Instructions Unconstitutionally Shifted the Burden of Proof to Simmons in the Penalty Phase of Trial - Ground 11.

Simmons claims that the jury instructions given during the penalty phase shifted the burden to him, thereby violating his right to be free from cruel and unusual punishment and his due process rights.

The penalty phase procedures in a Missouri capital case are established by Mo. Rev. Stat. § 565.030.4.[13] The statutory procedure requires the jury first to find unanimously beyond a reasonable doubt that an aggravating

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[13]Simmons also claims that the judge may sentence the defendant to death if the jury does not do so. This allegation is correct. Under Missouri law, as previously discussed, when the jury is deadlocked on its choice of punishment, the judge becomes the sentencer.

circumstance has been proved. If the jury makes such a finding, it then moves on to determine whether the aggravating circumstance or circumstances warrant the imposition of the death sentence. If the jury finds the death sentence is warranted, they must then consider whether mitigating circumstances outweigh the aggravating circumstance(s). If mitigating circumstances outweigh the aggravating circumstance(s), then life imprisonment is the only sentence that can be given. Even if the aggravating circumstance(s) are not outweighed by the mitigating circumstances, a death sentence is not mandatory. The jury can always opt to sentence the defendant to life imprisonment. See Mo. Rev. Stat. §560.030.4.

Simmons argues that requiring the jury to find an aggravating circumstance warranting the death sentence before it is allowed to consider mitigating circumstances shifts the burden of proof to the defendant. Simmons argues that the sentencing procedure creates a presumption of guilt, i.e. that the defendant deserves the death penalty, which the defendant must then rebut.

The Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759. The Court must then review the state court's determination of this issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

The Eighth Circuit rejected an argument identical to Simmons' in Boulder v. Armontrout, 921 F.2d 1359 (8th Cir. 1990). The petitioner in Boulder was sentenced using the same statutory framework followed by the court in sentencing Simmons. Id. Boulder, like Simmons, argued that the procedure unconstitutionally shifted the burden of proof to him. Id. The court rejected the argument that the procedure unconstitutionally shifted the burden of proof to him. Id. The Eighth Circuit reasoned that the sentencing procedure did not require Boulder, here Simmons, to

present mitigating evidence to avoid imposition of the death sentence. Id. at 1367. The Eighth Circuit reached this conclusion because even if the petitioner did not present mitigating evidence, the jury could choose to sentence him to life imprisonment. Id. The Eighth Circuit also relied on United States Supreme Court cases upholding sentencing procedures similar to Missouri's. See Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976).

The Missouri Supreme Court rejected Simmons' claim using the same reasoning employed by the Eighth Circuit in Boulder as follows:

> Simmons contends that the deliberation scheme erected by sec. 565.040, RSMo 1994, is unconstitutional in violation of his rights to due process, trial by jury, and freedom from cruel and unusual punishment. Specifically, Simmons argues that the fact that the jury must first find that the aggravating circumstances are sufficient to warrant the imposition of death before it begins considering balancing the mitigating circumstances against the found aggravating circumstances impermissibly shifts the burden of proof to the defendant. As we have explained in previous cases, however, the jury's decision that the death penalty is warranted is not the same as its deciding that it shall be imposed. State v. Tokar, 918 S.W.2d 753, 771 (Mo. bane 1996). In fact, the order of proceedings actually present an advantage to the defendant by requiring the state to completely prove its aggravating case before allowing the jury to even consider application of the death penalty. Id. Moreover, it would be illogical to have the

> jury consider mitigators if it had not first found that the death sentence was warranted arid if it had not found aggravators against which to balance the mitigators. The statute and the instructions based on it meet Simmons' constitutional concerns.

Simmons, 955 S.W.2d at 743.

In light of the fact that similar sentencing procedures have been upheld by the United States Supreme Court, the Missouri Supreme Court's determination in this case is not contrary to nor an unreasonable application of existing federal law. The relief requested on this basis will be denied.

XI. Simmons' Incompetence to Proceed and to be Executed - Ground 12.

Simmons' counsel requests this Court to stay these proceedings until further determination can be made regarding Simmons' competence to proceed and to be executed. He states that Simmons refused to meet with counsel, cooperate with these proceedings and refused to sign the petition, however, Simmons has not indicated that he wished to abandon these proceedings. Simmons' counsel reiterates all of the psychological evaluations discussed in Grounds IA and IB. In addition, Simmons' habeas proceeding counsel requested Simmons be evaluated by another psychiatrist, Dr. Shopper. Dr. Shopper diagnosed Simmons as mentally ill with a delusional disorder. The State then requested a mental health examination, however, Simmons was not fully cooperative during this evaluation. Simmons' counsel submits that all of the above-referenced reports refute the court's finding of competence.

This Court's habeas review begins by identifying the controlling United States Supreme Court precedent on this

issue. See 28 U.S.C. § 2254(d)(1); Long, 184 F.3d at 759. The Court must then review the state court's determination of this issue and ensure that it was not contrary to or an unreasonable application of the established Supreme Court precedent. Id.

With regard to whether Simmons is competent to be executed, the United States Supreme Court has held that execution of an incompetent criminal constitutes cruel and unusual punishment in violation of the Eighth Amendment. Ford v. Wainwright, 477 U.S. 399, 417 (1986). In assessing a petitioner's competence to be executed, the court must determine (1) whether the petitioner understands that he is to be punished by execution; and (2) whether the petitioner understands why he is being punished. Ford, 477 U.S. at 42 1-22 (Powell, J., concurring).

Simmons has undergone numerous psychological evaluations and has almost consistently been adjudged competent to proceed. Sec discussion in Part I, Ground IA and IB. Most recently, at the request of this Court, Simmons was referred to the United States Medical Center for Federal Prisoners in Springfield, Missouri for an opinion on his competence. On December 16, 1999, Dr. Richard Frederick forwarded his report to the Court and counsel for both parties. Dr. Frederick found Simmons to be aware of the nature and potential consequences of his legal status. Dr. Frederick notes that Simmons understood the facts of the case and the events that led to his conviction, Finally, Dr. Frederick found that Simmons did not manifest any mental disease, disorder or defect. Consequently, there was no reason to conclude that Simmons lacked capacity to proceed for the foreseeable future.

Simmons' claim of lack of competence to proceed or to be executed is not supported by the evaluation of Dr. Frederick. Relief on this basis will be denied.

Request for Evidentiary Hearing

Simmons has requested an evidentiary hearing on each and every one of his grounds for relief.

The Antiterrorism and Effective Death Penalty Act of 1996 sharply constricted the circumstances in which a federal habeas court may order an evidentiary hearing. Section 2254(e)(2) of Title 28 now reads:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —
> (A) the claim relies on —
> (I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

In reviewing Simmons' request for an evidentiary hearing, it is apparent that the request is essentially premised on Simmons' contention that he did not receive an adequate post-conviction review hearing. As an initial matter, the Court notes that the Constitution does not require states to provide a means of post-conviction review of state convictions, therefore an infirmity in a state post-conviction proceeding does not raise a cognizable issue in a federal habeas petition. Gee v. Groose, 110 F.3d 1346, 135 1..52 (8th Cir. 1997). Further, a review of the facts urged by Simmons does not leave the Court with a belief

that they are sufficient to establish "by clear and convincing evidence" that no rational trier of fact would have found Simmons guilty or that the sentence would have been different. The Court will, therefore, deny Simmons' request for an evidentiary hearing.

Certificate of Appealability

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amended 28 U.S.C. § 2253 to require an unsuccessful petitioner for § 2254 habeas corpus relief to obtain a certificate of appealability ("COA") in order to take an appeal to the court of appeals. District courts have the authority to issue COAs. Tiedeman v. Benson, 122 F.3d 518, 520 (8th Cir. 1997); see also Fed.R.App.P. 22(b). However, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. See Cox v. Norris, 133 F.3d 565, 569 (8th Cir, 1997)(citing Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir. 1994)).

This Court believes that Simmons has made the showing necessary for issuance of a certificate of appealability on grounds 1A, 1B, 2, 4B, 9, and 12 and will issue a certificate of appealability on those grounds accordingly. The Court does not believe that Simmons has made the showing necessary for issuance of a certificate of appealability on the remainder of his grounds for relief and will not issue one.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's Petition for Writ of Habeas Corpus is **DENIED**.

IT IS FURTHER ORDERED that all other motions pending In this matter are **DENIED** as moot.

IT IS FURTHER ORDERED that a certificate of appealability will issue to petitioner on Grounds IA, 1B, 2, 4B, 9 and 12 raised in his Petition for Writ of Habeas Corpus.

A separate Order of Dismissal shall accompany this Order.

/s/ Rodney W. Sippel
RODNEY W. SIPPEL
UNITED STATES
DISTRICT JUDGE

Dated this 30th day of March, 2001.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIE SIMMONS,	)
	)
Petitioner,	)
	)
v.	)
	)#4:97CV2
	)537 RWS
	)
MICHAEL BOWERSOX,	)
	)
Respondent.	)

JUDGMENT

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Willie Simmons' Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 is denied.

IT IS FURTHER ORDERED that as to grounds IA, 1B, 2, 4B, 9 and 12, petitioner has made a substantial showing of the denial of a federal constitutional right, and a certificate of appealability is hereby issued with regard to those grounds only; as to all other grounds, petitioner has not made a substantial showing of the denial of a constitutional right, and this Court will not issue a certificate of appealability.

/s/ Rodney W. Sippel
RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 30th day of March, 2001

SUPREME COURT OF MISSOURI

en banc

State of Missouri,	)
	)
Petitioner,	)
	)
vs.	)#. 77368
	)
	)
	)
WILLIE SIMMONS,	)
	)
Respondent.	)

APPEALS FROM THE CIRCUIT COURT OF ST. LOUIS CITY

Honorable Robert H. Dierker, Jr., Judge (At Trial and 29.15)

A jury convicted Willie Simmons of the first degree murder of Cheri Johnson and sentenced him to death. The postconviction court overruled Simmons' Rule 29.15 motion. This Court has jurisdiction. Mo. Const. art. V, sec. 3. We affirm the judgments.

I. FACTS

Simmons was charged with the murder of Cheri Johnson in the first count of a two-count indictment. The second count charged Simmons with the murder of Leonora McClendon. Simmons was originally tried for both counts in the same proceeding and was found guilty on both counts. This Court overturned those convictions on the basis that the two murder charges should not have

been tried together. ***State v. Simmons***, 815 S.W.2d 426 (Mo.banc 1991). On remand, Simmons was first tried for the murder of Cheri Johnson and once again found guilty. He was then tried and convicted for the murder of Leonora McClendon.

The evidence at trial, which we review in the light most favorable to the verdict, ***State v. Storey***, 901 S.W.2d 886, 891 (Mo.banc 1995), reveals the following:

On the evening of November 30, 1987, neighbors heard screams and thumping noises emanating from Cheri Johnson's Plaza Square apartment. A building security guard investigated the noises. He knocked on Johnson's apartment door several times before a male voice said that everything was okay and that the woman was sleeping. The security guard asked to be let inside the apartment, but there was no further response. Eventually, the security guard departed.

The next day, Johnson did not show up for work. Upon investigation, the police found her dead, beaten in the head and strangled with a distinctively colored necktie. During an examination of the apartment, the police discovered a carnation wrapped in purple paper. They traced this carnation to a flower shop in St. Louis Centre, where the employees informed them that the purple paper was unique to their shop, and that the previous day the only person who had bought a carnation was a man wearing a tie matching the one around Johnson's neck. One of the employees thought that the man worked at Walgreen's. The police inquired at Walgreen's and found that although he no longer worked there, the man's name was Willie Simmons.

The police arranged for Simmons to come in for an interview in early December, but he did not appear.

They then began searching for him. On January 3, 1988, he came to them, showing up at the homicide office. He gave increasingly incriminating responses to police questioning: at first asserting that he had met Johnson but had never been to her apartment; next, saying that they had had a relationship, that she had given him a key to her apartment, and that he kept some items of clothing there, including the distinctive tie; then, saying that on November 30, he had gone to Johnson's apartment to take her the carnation and other items, but had left these items at her front door and had not gone in the apartment; finally, saying that he had gone inside the apartment that day. He could not, however, produce for police the alleged key to Johnson's apartment.

The police then arrested Simmons for Johnson's murder. They seized his billfold and recovered, among other items, three pawn tickets and claim checks for photographs being developed. Two of the pawn tickets were for jewelry belonging to Johnson and the other was for a watch owned by McClendon. Simmons first explained the presence of these pawn tickets by saying that Johnson had given him the jewelry to pawn to raise money to fix his automobile, then changed his story and said that he had stolen the jewelry from Johnson's apartment after finding her dead on the floor. The autopsy of Johnson revealed scratch marks on her fingers consistent with forcible removal of jewelry. The photographs that police recovered from the claim checks included numerous images of Simmons, including one of him wearing the distinctive tie found around Johnson's neck, and one of him at the flower shop where he had bought the carnation.

H. ALLEGATIONS OF TRIAL COURT ERROR

A. DISQUALIFICATION OF JUDGE

Simmons asserts that the trial court erred in overruling his motion to remand for a hearing on the State's motion to disqualify the judge originally assigned to Simmons' cases. The State's motion to disqualify was sustained on November 23, 1993, and the cases were transferred to a different judge. Simmons' motion for remand, filed Januaty 6, 1994, alleged that the disqualification of Judge Peek was improper in that the State had already received an automatic change of judge under Rule 32.07 on January 6, 1992.

In ruling on the motion to remand for a hearing, Judge Dierker construed the State's April 23 motion as a motion to disqualify for cause. There is nothing in the record to indicate that this interpretation was incorrect. Under Rule 32.10, the State could properly move for a disqualification for cause, even after previously receiving an automatic change of judge. Simmons does not contend that Judge Peek improperly assessed the impropriety of his continued involvement in the cases, and having apparently determined that he was biased, Judge Peek properly removed himself from Simmons' cases. Under these facts, Judge Dierker had no reason to remand for a hearing on the State's motion for disqualification of Judge Peek; thus, the trial court committed no error in overruling Simmons' motion to reman for a hearing. Furthermore, because the disqualification was proper, Simmons' related claims of 1) ineffective assistance of counsel for failing to petition for a writ of prohibition to prevent Judge Dierker from hearing the cases, and 2) prosecutorial misconduct for filing a second motion for change of judge, are both necessarily invalid.

B. MOTION TO SUPPRESS

Simmons next argues that the trial court erred in

denying his pretrial motion to suppress evidence obtained by the police through two of the pawn tickets and the CPI Photo receipts found in his wallet and in overruling his objection to the admission of this evidence at trial. We review the denial of a motion to suppress to determine whether sufficient evidence exists to support the trial court's decision. ***State v. Wise***, 879 S.W.2d 494, 503 (Mo.banc 1990).

During the ivnestigation, the police learned that the pawn tickets were for jewelry owned by Cheri Johnson, and they used the photo receipts to recover photographs from the CPI lab. Simmons contneds that the police violated his Fourth Amendment right to be free from unreasonable searches and seizures both when they seized the pawn tickets and photo receipts and later when they seized the jewelry and photographs. The seizure of the pawn tickets and photo receipts was part of a legitimate inventory search, despite Simmons' assertion that the police were merely rummaging through his wallet. To succeed on his challenge of the seizure of the jewelry and photographs. Simmons has the burden of showing standing through an expectation of privacy in the items seized. ***Id.*** at 504. Nevertheless, Simmons does not even attempt to identify any privacy interest in the evidence that was obtained from either the pawn tickets or the CPI receipts. Obviously, Simmons had no expectations of privacy in the premises of the photo development business; but more importantly, he relinquished any right of privacy he had in the photographs or negatives themselves by giving them to the developer. ***See State v. Urban***, 798 S.W.2d 507, 514-15 (Mo.App. 1990). In doing so, he assumed the risk that the photographs might be shown to others, even the authorities. ***Id.*** at 515. As to the pawn tickets, we are at a total loss to discern any expectation of provacy on the part of Simmons in stolen jewelry located in a

public pawn shop. In sum, the trial court properly denied the motion to suppress and allowed admission of the evidence at trial.

C. VOIR DIRE

Simmons asserts that the prosecutor made several improper, objectionable statements during voir dire. However, Simmons objected to only one of these statements, when the prosecutor said that the jurors would make a punishment "recommendation" to the judge. Citing ***Caldwell v. Mississippi***, 472 U.S. 320, 328-29 (1985), he suggests that the comment "impermissibly led the jury to believe the responsibility for determining the appropriateness of [the] sentence lay elsewhere." This Court, however, has repeatedly rejected this same argument. ***Antwine v. State***, 791 S.W.2d 403, 410 (Mo.banc 1990), ***cert. denied***, 498 U.S. 1055 (1991); ***State v. Roberts***, 709 S.W.2d 857, 868-69 (Mo.banc 1986), ***cert. denied***, 479 U.S. 946 (1986). The point has no merit.

We need not consider the merits of the remainder of the allegedly improper comments. Having reviewed the entire record, we find that no manifest injustice or miscarriage of justice resulted from those comments even if they were improper and, therefore, we have no discretion to grant plain error relief. *See* Rule 30.20.

One venireperson, an African-American woman, was removed from the jury by the prosecutor's perempptory strike. Simmons alleges that this removal was race-based, in violation of ***Batson v. Kentucky***, 476 U.S. 79 (1986). If the defendant wishes to challenge a prosecutor's peremptory strike, he must first raise the challenge by identifying the cognizable racial group to which the stricken venireperson belongs. The trial court

will then require the State to proffer a reasonably specific and race-neutral reason for striking the venireperson. The defendant then has the opportunity to show that the proffered race-neutral reasons are merely pretextual and that the strike is actually race-based. ***State v. Parker***, 836 S.W.2d 930, 939 (Mo.banc 1992).

After Simmons chalenged the prosecutor's strike of the particular venireperson, the prosecutor offered several race-neutral reasons for striking her: she was perceptibly weak on the death penalty, she was agitated or perturbed to be at voir dire, and she was an employee of the post office, an occupation with which the prosecutor claimed he had had poor results on juries. After Simmons argued that these reasons were merely pretextual, the trial court denied his challenge. This decision will be overturned only if it is clearly erroneous. ***State v. Antwine***, 743 S.W.2d at 66. The reasons put forth by the prosecutor are sufficiently race-neutral and non-pretextual to allow us to conclude that the trial court did not clearly err in denying Simmons' ***Batson*** challenge. This point is rejected.

D. GUILT PHASE

1. Prosecutor's Comments

Simmons raises numerous claims of error regarding allegedly improper statements in the prosecutor's opening and closing guilt phase arguments. None of these errors were preserved for appellate erview, however, either because they were not objected to or because they were not raised in Simmons' motion for new trial. We need not pass on the merits of these allegedly improper statements. After reviewing the entire record, we find that no manifest injustice or miscarriage of justice resulted from those statements even if they

were improper and, therefore, we have no discretion to grant plain error relief. *See* Rule 30.20.

2. Testimony.

Next, Simmons cites numerous excerpts from witness testimony to which his counsel made no objection that he claims constitute plain error of the trial court for failure to declare a mistrial *sua sponte*. Again, we need not pass on the merits of these alleged errors. Having reviewed the entire record, we find no manifest injustice or miscarriage of justice and, therefore, we have no discretion to grant plain error relief. *See* Rule 30.20. Simmons has, however, preserved other complaints about witness testimony for our direct appellate review, and we review these claims for trial court abuse of discretion. *See State v. Griffin*, 756 S.W.2d 475, 483 (Mo.banc 1988).

First, Simmons alleges a violation of his Fifth Amendment right to silence when a detective testified that Simmons did not appear for a December 1987 interview even though Simmons "knew we wanted to talk to him." The trial court properly overruled Simmons' objection to the detective's testimony. We disagree that the detective's testimony about Simmons' failure to appear for an interview was a comment on Simmons' right to remain silent. Regardless, Simmons was not in custody at that time, and evidence of a defendant's silence is only disallowed if the defendant was in custody. *State v. Kinder*, 942 S.W.2d 313, 326 (Mo.banc 1996).

Simmons also complains of a detective's testimony, admitted over an hearsay objection, that employees of the St. Louis Centre flower shop and Walgreen's gave him information concerning Simmons' identity and description. This information was not

offered for the truth of the matter asserted -- that Simmons had purchased flowers and had been an employee at Walgreen's -- but was admissible, rather, to explain the detective's subsequent actions in pursuing Simmons. Therefore, it was not hearsay. ***See State v. Murray***, 744 S.W.2d 762, 773 (Mo.banc 1988).

This same detective also testified taht he found pawn tickets from two different pawn shops in Simmons' wallet. Simmons, believing that this testimony amounted to impermissible evidence of "other crimes," moved for a mistrial, and the court denied this motion. Unless the testmomy objected to consists of clear evidence of another crime, there is no trial court abuse of discretion in denying a mistrial. ***State v. Hornbuckle***, 769 S.W.2d 89, 96 (Mo.banc 1989). Here, neither the general act of having pawn tickets nor the specific act of having pawn tickets from two different locations is a crime or intrinsic evidence of a crime. The fact that two pawn tickets were tied to this crime, leading police to recover some of Johnson's jewelry that Simmons had pawned, does not make the third pawn ticket from a different pawn shop clear evidence of another crime.

Another detective testified, in response to the prosecutor's questioning, that Simmons told the detective he did not appear for the December 1987 interview because Simmons "thought he was wanted. . . for another incident." The court again denied Simmons' "other crimes"-based mistrial motion, and Simmons declined to accept the court's offer to instruct the jury to disregard the comment. After a brief conference between counsel and the court, the prosecutor resumed questioning without further reference to the comment. While this statement mighta hve been objectionable, its isolated and vague nature does not sufficiently constitute clear evidence of another crime to allow us to conclude that the trial court

abused its discretion in refusing a mistrial. Simmons' testimonial points are denied.

3. Physical Evidence

Simmons contends that several items of physical evidence, chiefly photographs, were improperly admitted at the guilt phase. The admission of photographs is within the broad discretion of the trial court. ***State v. Isa***, 850 S.W.2d 876, 890 (Mo.banc 1993). Photographs that tend to corroborate witnesses' testimony, help the jury understand testimony, or prove an element in the case are admissible. ***Id.***

Exhibits 127-130 depict Johnson's body lying on the autopsy table before the autopsy had begun. Simmons argues that these photographs were more prejudicial than nprobative. Compared to other murder victim photographs, however, these are not particularly gruesome. Three of them are of the head and upper torso only. They were introduced during the pathologist's testimony and, contrary to Simmons suggestion, were used to explain testimony regarding Johnson's head wounds and other injuries. Explanation of a pathologist's testimony is an acceptable reason to introduce autopsy photographs. ***See Isa***, 850 S.W.2d at 890-91; ***State v. Mease***, 842 S.W.2d 98, 108-09 (Mo.banc 1992).

Simmons also avers that the trial court erred in admitting a photograph obtained from CPI Photo because it was irrelevant and highly prejudicial. This photogrpah was one of several that showed Simmons wearing the tie used to strangle Johnson, showed him at the flower shop where he bought the telltale carnation, and showed other people and items proving that the photographs are Simmons'. The particular photograph of which Simmons now complains depicts him appearing to joke around with

a young woman. Both individuals are smiling an/or laughing, Simmons' left arm is around the woman, and his right arm/hand is on her neck. Simmons misconstrues this photograph as purporting to show that Simmons is a "lady-killer." The photograph appears entirely light-hearted and does nothing of the kind. The point is denied.

Next, Simmons complains of the admission of a mug shot of Simmons from a prior arrest. One detective used this photograph to display when canvassing for Simmons. The photograph was admitted during the detective's testimony recounting how he searched for Simmons. Only now does Simmons contend that the mug shot is evidence of other crimes, and his objection and his motion for new trial complained only of an improper foundation for admitting the photograph. Therefore, we review only for plain error. Rule 30.20; ***Ervin***, 835 S.W.2d at 919.

All dates and other identifying marks on the photograph were redacted. The only thing identifying the photograph as a "mug shot" is its nature -- showing Simmons from the side in the first shot, then looking straight into the camera in the adjoining second shot. Only an unusually attentive and deductive juror would conclude that since the detective was canvassing with this photograph before Simmons' arrest for Johnson's murder, and since the photograp appears to be a mug shot, it must be a mug shot from another crime of Simmons. This deductive process does not constitute clear evidence of another crime, ***Hornbuckle***, 769 S.W.2d at 96. We need not pass on the merits of the alleged error. After reviewing the entire record, we find that no manifest injustice or miscarriage of justice resulted from admission of the mug shot even if the mug shot was improperly admitted and, therefore, we have no discretion to grant

plain error relief. *See* Rule 30.20.

4. Instructional Error

Simmons also requests plain error review of the use of Instruction 5 during the guilt phase. Simmons does not complain of the content of the instruction but, rather, its physical nature. The document instructs the jurors that if they find the proper elements, "then you will find the defendant guilty under Count I of murder in the first degree." The words "under Count I" were scratched through yet still clearly legible, and apparently refer to the State's case against Simmons for the murder of Leonora McClendon. The jurors had absolutely no knowledge of the McClendon case, however, and it takes a leap of the imagination to believe that a juror would conclude from Instruction 5 that there must be some other first degree murder charge against Simmons. The document itself does not really lend itself to this construction. We need not pass on the merits of the alleged error. Having reviewed the entire record, we find that no manifest injustice or miscarriage of justice resulted from the use of this instruction even if it was improperly crafted and, therefore, we have no discretion to grant plain error relief. *See* Rule 30.20.

5. Sufficiency of the Evidence

Simmons contends that the evidence was insufficient to prove that he killed Johnson "knowingly. . . after deliberation," as required for first degree murder. Sec. 565.020.1, RSMo 1986. When reviewing for sufficiency, we view the evidence, together with all reasonable inferences drawn therefrom, in the light most favorable to the State and disregard all evdience and inferences to the contrary. ***State v. Silvey***, 894 S.W.2d 662, 673 (Mo.banc 1995). Deliberation occurs when the

perpetrator acts with a cool and deliberate state of mind. ***State v. Turner***, 623 S.W.2d 4, 7 (Mo.banc 1981). This mental state is rarely provable directly and is usually shown circumstantially. ***Id.*** The actual evidence in this case shows that Johnson was hit more than once in the head with a heavy object, that she was strangled with a necktie, and that such strangulation would take four to five minutes. A reasonable inference from this evidence is that, after hitting Johnson in the head with a heavy object, Simmons saw that she was not dead, took off his necktie, and spent four to five minutes strangling her. This evidence is sufficient to support the jury's finding of deliberation. Point denied.

Simmons presents the argument that the burden of proof instruction improperly defines the term "reasonable doubt." This argument is again rejected. ***See Kinder***, 942 S.W.2d at 930.

E. PENALTY PHASE

1. Prosecutor's Comments

Simmons requests plain error review of one comment of the prosecutor made during nthe penalty phase opening statement and several comments made during the penalty phase closing argument. We need not pass on the merits of these allegedly improper comments. Having reviewed the entire record, we find that no manifest injustice or miscarriage of justice resulted from these comments even if they were improper and, therefore, we have no discretion to grant plain error relief. ***See*** Rule 30.20.

Simmons did object to the following comments of the prosecutor made during the penalty phase closing argument:

> What person in this world if they had some means at their disposal, a gun, a baseball bat, something--
> DEFENSE COUNSEL: Same objection.
> THE COURT: Objection is overruled.
> PROSECUTOR: -- would not go to this woman's aid, and if it was necessary, bash him on the back of the head, you know, maybe say stop . . . and if you had to bash him hard enough to kill him, you would be justified, the person would be justified.

Simmons now argues that the prosecutor's argument was inflammatory and designed to arouse the jury's passions and prejudices. However, it is not at all clear that his objection at trial was based on the same theory. The "same objection" language references an earlier objection which, although far from clear, apparently tries to assert that the prosecutor's argument is improperly personalizing the case to the jury:

> [A]nd you're standing there, or I'm standing there, any one of us is standing there watching it --
> DEFENSE COUNSEL: Judge, I'm going to object to the Prosecutor's intending to argue some type of something outside the instructions.
> THE COURT: That objection will be overruled. Let's keep it abstract, however, as to persons . . . .

The timing of the two objections, interrupting sentences in which the prosecutor was surmising what could have happened if various persons were at the crime scene, lends support to the conclusion that the objections were based on improper personalization, as does the fact that Simmons' brief cites ***State v. Raspberry***, 452 S.W.2d 169 (Mo. 1970), a case that holds that the prosecutor may not personalize an argument to the jury. Furthermore, in his motion for new trial, Simmons framed this issue by claiming that the "trial court erred when it overruled

defense counsel's objections to the prosecutor's penalty phase argument that *any juror or person* would have had the right to use deadly force to kill the attacker...." (emphasis added). Therefore, we will review Simmons' contention for trial court abuse of discretion in failing to sustain an objection based on improper personalization. *See* ***Kinder***, 942 S.W.2d at 329.

Although, as the trial court acknowledged, the argument approaches the line separating proper argument from improper personalization argument, it does not cross the line. Improper personalization results, among other ways, when the prosecutor asks the jurors to place themselves or some identifiable person in the shoes of the victim or at the crime scene. ***See Storey***, 901 S.W.2d at 901-02. The prosecutor's argument did not do so. Instead, it is more analogous to acceptable "societal self-defense" argument. ***See Kreutzer***, 928 S.W.2d at 876. This point is denied.

2. Testimony

Simmons points us to several examples of witness testimony during the penalty phase to which his counsel did not object. He asserts that the trial court committed plain error by failing to declare a mistrial *sua sponte*. We need not pass on the merits of these alleged errors. Having reviewed the entire record, we find that no manifest injustice or miscarriage of justice resulted from thsee statements even if they were improper and, therefore, we have no discretion to grant plain error relief. *See* Rule 30.20.

3. Evidence of the Murder of Leonora McClendon

Simmons complains that during the penalty phase, the state presented extensive evidence of the murder of

Leonora McClendon including rather gruesome autopsy photographs. The jury, however, did not find the murder of McClendon as an aggravating circumstance. Instead, they did find one of the three submitted statutory aggravators and eight of the nine submitted nonstatutory aggravators. These findings are sufficient to support the imposition of the death penalty and render the introduction of the McClendon evidence irrelevant. *See* ***State v. Tokar***, 918 S.W.2d 753, 772 (Mo.banc), ***cert. denied***, ___ U.S. ___, 117 S.Ct. 307 (1996). The point is denied.

4. Prior Convictions/Bad Acts Evidence

Simmons complains variously that his prior convictions were improperly explored in detail during the penalty phase of the trial and that prior acts for which he had not been convicted were introduced as evdience of his character and as nonstatutory aggravators. As a general proposition, however, the facts and circumstances surrounding prior convictions, not just the existence of those convictions, may be introduced during the penalty phase. ***State v. Whitfield***, 837 S.W.2d 503, 511-12 (Mo.banc 1992); ***State v. Debler***, 856 S.W.2d 641, 657 (Mo.banc 1993). The trial court has discretion to control the evidence concerning these circumstances. ***Whitfield***, 837 S.W.2d at 512. In addition, prior unadjudicated criminal conduct may properly be heard by a jury during the penalty phase of a trial. ***State v. Petary***, 781 S.W.2d 534, 539 (Mo.banc 1989). We perceive no abuse of discretion by the trial court in its management of the evidence presented during the penalty phase of Simmons' prior crimes or unadjudicated criminal conduct. The point is denied.

5. Victim Impact Evidence

Simmons also contends that victim impact evidence introduced concerning the effect of the murders on the families of Cheri Johnson and Leonora McClendon rendered the penalty phase fundamentally unfair, so as to violate his right to due process. ***See Payne v. Tennessee***, 501 U.S. 808, 825 (1990); ***Darden v. Wainwright***, 477 U.S. 168, 181 (1986). He also contends that all victim impact evidence introduced in criminal penalty phases before the amendment to sec. 565.030.4, RSMo 1994, which authorizes victim impact evidence, violates Mo. Const. art. I, sec. 21 (cruel and unusual punishment). Both contentions are frivolous.

The victim impact evidence from Johnson's family occupies three pages out of a penalty phase transcript of two hundred and ninety-four pages. This type of testimony is authorized both by ***Payne***, 501 U.S. 808, and by sec. 565.030.4, RSMo 1994. The impact of this evidence does not possibly jeopardize Simmons' right to due process. The victim impact evidence concerning Leonora McClendon is rendered irrelevant because the jury declined to find the statutory aggravator of McClendon's murder. Additionally, Simmons' art. I, sec. 21 argument is simply incorrect; further, a statute would not be able to authorize victim impact evidence if it truly was contrary to the Missouri constitution, which it is not. ***See Wise***, 879 S.W.2d at 515-16. He was tried after the amendment to sec. 565.030.4, not before.

6. Aggravating Circumstances Instructions

Simmons claims that the trial court erred in submitting Instructions Nos. 20 and 21. Those instructions set forth the statutory and nonstatutory aggravating circumstances, respectively, and read as follows:

INSTRUCTION NO. 20

In determining the punishment to be assessed against the defendant for the murder of Cheri Johnson, you must first unanimously determine whether one or more of the following aggravating circumstaces exists:

1. Whether the defendant murdered Cheri Johnson for the purpose of the defendant receiving money or any other thing of monetary value from Cheri Johnson.

2. Whether the murder of Cheri Johnson involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find

a. That the defendant inflicted physical pain on emotional suffering on Cheri Johnson and that the defendant did so for the purpose of making her suffer before dying;

b. That the defendant killed Cheri Johnson after she was rendered helpless by the defendant and that the defendant thereby exhibited a callous disregard for the sanctity of all human life;

c. That the defendant committed repeated and excessive acts of physical abuse upon Cheri Johnson, and that the killing was therefore unreasonably brutal.

3. Whether Cheri Johnson was a potential witness in a pending investigation, namely the forcible taking of her jewelry and the assault upon her person on November 30, 1987 and was killed as a result of her status as a potential witness.

INSTRUCTION NO. 21

If you have found beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 20 exists, then, in determining the punishment to be assessed against the defendant for the murder of Cheri Johnson, you may also consider:

1. Whether the defendant pled guilty to Fraudulent Use of a Credit Device on May 31, 1984, in the Circuit Court of the City of St. Louis, State of Missouri.

2. Whether the defendant pled guilty to Passing a Bad Check: No Account on December 8, 1986, in the Circuit Court of the City of St. Louis, State of Missouri.

3. Whether the defendant pled guilty to Assault Third Degree of Stephen Davis on April 14, 1987, in the Circuit Court of the City of St. Louis, State of Missouri.

4. Whether the defendant pled guilty to Assault Third Degree of Jane Davis on April 14, 1987, in the Circuit Court of the City of St. Louis, State of Missouri.

5. Whether the defendant pled guilty to Trespass in the First Degree on April 14, 1987, in the Circuit Court of the City of St. Louis, State of Missouri.

6. Whether the defendant murdered Leanora [sic] McClendon as submitted in Instruction No. 22.

7. Whether the defendant stole the motor vehicle of Norma Whiteside as submitted in Instruction No. 23.

8. Whether the defendant assaulted Michelle Aldridge as submitted in Instruction No. 24.

9. Whether the defendant has a bent or trait of character exhibited by a history of physical abuse toward women....

The jury found the statutory aggravating circumstance number 2, and all of the nonstatutory aggravating circumstances except number 6, McClendon's murder.

Simmons contends that none of the aggravating circumstances contained in the above instructions should have been submitted to the jury, but only one of his complaints about the aggravating circumstances -- the complaint involving the depravity of mind aggravator -- has been preserved for appellate review. That aggravator, Simmons alleges, is unconstitutionally vague. This Court has repeatedly held, though, that the limiting provisions set out in Instruction No. 20, 2(a),(b), and (c) above, satisfy any vagueness concerns and that the aggravator is not constitutionall infirm. ***State v. Harris***, 870 S.W.2d 798, 813 (Mo.banc 1994). The point is denied.

Simmons requests plain error review for his proposition that the nonstatutory aggravator "whether the defendant has a bent or trait of character exhibited by a history of physical abuse toward women" is duplicative of other aggravators. Aggravators submitted multiple times, he explains, are unconstitutional because they "do not channel the jury's discretion by narrowing the class of those eligible for death." Unlike statutory aggravators, however, nonstatutory aggravators are not designed to narrow the class of those eligible for death. Nonstatutory aggravators, however, perform no function in the "eligibility" stage of capital sentencing; they are simply an incomplete list of facts relevant to whether or not the defendant should be sentenced to death at the "selection" stage. ***See Brown***, 902 S.W.2d at 293 (holding that a nonstatutory aggravator's duplication of facts from a statutory aggravator was harmless error, if error at all). The point is denied.

Finally, Simmons posits that the State was collaterally estopped from presenting certain nonstatutory aggravators because the jury at his first trial declined to find these aggravators. Simmons misunderstands the nature of final judgments and collateral estoppel. As a

general proposition, collateral estoppel bars relitigation of a specific fact or issue that was unambiguously determined by a previous jury. ***State v. Nunley***, 923 S.W.2d 911, 922 (Mo.banc 1996). Its import in the criminal context is that if a jury has decided an "ultimate fact," that fact is barred from relitigation. ***Ashe v. Swenson***, 397 U.S. 436, 443 (1970). The jury's decision, however, must be distilled to a specific, unambiguous, and necessary finding of one particular fact, or finding on one specific issue, for that fact or issue to be barred from relitigation. ***See State v. Nunley***, 923 S.W.2d at 922; ***State v. Johnson***, 598 S.W.2d 123, 125-26 (Mo.banc 1980); ***State v. Booker***, 540 S.W.2d 90, 93 (Mo.App. 1976) (noting that because it is usually impossible to discern a specific basis upon which a jury reaches its verdict, collateral estoppel will rarely be available in a criminal context).

In the first trial, the jury's failure to find the particular nonstatutory aggravating circumstances were not "findings" at all, but rather a lack of them, and the ***Ashe*** rationale does not even apply. A jury is not called on to make a specific finding one way or the other, such as guilty or not guilty, or "yes" the aggravator has been proved or "no" the aggravator has not been proved. Instead, a jury is instructed merely to list on the verdict form those aggravators that it has, in fact, found, and there is no specific requirement that a finding be made that the other proposed aggravators were not found. *See* MAI_CR3d 313.48B; MAI-CR3d 313.58B1.A. Moreover, the failure to make a finding does not necessarily mean that the aggravator was not proved. A jury is instructed three times to determine whether "one or more" aggravating circumstances exist before it can deliberate on the death penalty. MAI-CR3d 313.41B; MAI-CR3d 313.42B; MAI-CR3d 313.48B. Once a jury

finds that one or more aggravators exist, as it did in the first case, it is unnecessary for it to pass on the other proposed aggravators. A particular aggravator, for instance, may be avoided because it is more difficult to judge, even though with further review, a jury might well decide that adequate proof was made on that particular aggravator. For these reasons, collateral estoppel does not apply. The point is denied.

7. Other Penalty Phase Instructional Errors

Simmons argues that the mitigating circumstances instruction, which instruct the jury that they "must" determine whether there are mitigating circumstances and continues on to list specific items which they "may" consider, misstates the law. This claim has been repeatedly rejected. ***State v. Copeland***, 928 S.W.2d 828, 853 (Mo.banc 1996). We do so yet again.

Additionally, Simmons contends that the deliberation scheme erected by sec. 565.030, RSMo 1994, is unconstitutional in violation of his rights to due process, trial by jury, and freedom from cruel and unusual punishment. Specifically, Simmons argues that the fact that the jury must first find that the aggravating circumstances are sufficient to warrant the imposition of death before it begins considering balancing the mitigating circumstances against the found aggravating circumstances impermissibly shifts the burden of proof to the defendant. As we have explained in previous cases, however, the jury's decision that the death penalty is *warranted* is not the same as its deciding that it ***shall be imposed***. ***State v. Tokar***, 918 S.W.2d 753, 771 (Mo.banc 1996). In fact, the order of proceedings actually present an advantage to the defendant by requiring the state to completely prove its aggravating case before allowing the jury to even consider application of the death penalty.

Id. Moreover, it would be illogical to have the jury consider mitigators if it had not first found that the death sentence was warranted and if it had not found aggravators against which to balance the mitigators. The statute and the instructions based on it meet Simmons' constitutional concerns.

F. SENTENCING ORDER

Simmons next contends that the trial court erred in entering its order of September 30, 1994, sentencing Simmons for the murders of Cheri Johnson and Leonora McClendon, because the order was not based solely on the facts and evidence presented during the trials. To support his contention, he directs this Court's attention to the following paragraph in the sentencing order:

> Willie Simmons was fairly well embarked upon a career which might have rivaled that of the infamous Ted Bundy, but for a sharp-eyed detective, who noticed a florist's distinctive wrapping paper in the apartment of one of the victims, and a narcissistic propensity to appear in his own photographs. . . .

Simmons argues that the reference to the serial killer shows that the trial court improperly sentenced him based on concern about his future dangerousness. The trial court adequately explained, however, in the Rule 29.15 findings that:

> Taken in context, the Court's reference to Simmons' criminal history as that of an incipient Ted Bundy is not so much a finding concerning Simmons, as it is hyperbole in praise of Detective Maier's police work. In or out of context, however, the reference betrays no inability

> to render fair judgment, since the career of Willie Simmons at the time the Court wrote its memorandum in September, 1994, included killing two women, assaulting three others, and threatening a female witness against him. The Court does nothing more than observe that this career "might well have rivaled" that of Bundy, had not good police work. . .led to his arrest and conviction.

We find no reason to doubt the trial court's explanation of the Ted Bundy reference. The court committed no error in entering its judgment accepting the jury's assessment of punishment for the murders of Cheri Johnson and Leonora McClendon.

III. ALLEGATIONS OF RULE 29.15 MOTION COURT ERRORS

A. MOTION TO DISQUALIFY JUDGE

Simmons argues that the motion court clearly erred in denying his motion to disqualify the judge, who presided over the underlying trial, from presiding over the Rule 29.15 proceeding. His grounds for disqualification were the judge's alleged bias and the judge's alleged status as a potential witness to some of the Rule 29.15 claims. A disqualifying bias arises if a reasonable person would find an appearance of impropriety and bout the impartiality of the court. ***Kinder***, 942 S.W.2d at 321. To support his claim of bias, Simmons again points to the sentencing order entered by the judge on September 30, 1994, for the murders of Leonora McClendon and Cheri Johnson. Specifically, Simmons alleges that the Ted Bundy reference, quoted above in Point II.F, and the following paragraphs of that order reveal bias:

> The Court. . . .agreeing wholeheartedly with the sentence recommended by each jury, will deny the motions for judgment of acquittal or new trial and sentence Simmons according. . . .
>
> Upon review of the law and the record, the Court is convinced beyond doubt that each jury's assessment of punishment on the counts in this case is fair, just, reasonable and in accordance with the law. Without wishing to turn a deaf ear in advance to any plea for mercy at allocution, the Court is bound to say that the defendant richly deserves the supreme penalty in this case. The murder of Leonora McClendon was particularly brutal and repulsive, and defendant's future on death row is not likely to be any more agonizing than Leonora McClendon's death agony in the bathtub following defendant's ministrations; and his end, when it finally comes after the wheels of justice have ground slowly and exceedingly fine, will be merciful in comparison. . . .

Simmons argues in a conclusory fashion that these comments would cause a reasonable onlooker to conclude that the judge was prejudiced, without any attempt to identify the particular bias these comments allegedly reveal. We can see no bias revealed in the above paragraphs that would cause a reasonable onlooker to question the judge's ability to impartially consider Simmons' Rule 29.15 motion. The comments properly express reason for agreeing with the jury's recommendation of the death sentence for both murders.

Simmons also complains that the following statement contained in the Rule 29.15 judgment reveals bias:

> The Court was convinced after the jury's verdict

> in 1994 that Willie Simmons murdered both women; the Court remains convinced, and reiterates its finding beyond a reasonable doubt that Simmons is in fact guilty of both crimes.

The judge's continued belief after the postconviction hearing that Simmons was guilty does not impinge upon his ability to impartially consider Simmons' Rule 29.15 claims. In what appears to be an additional allegation of bias, Simmons argues that the judge could not fairly judge Simmons' Rule 29.15 claim of incompetency because the judge would be justifying his failure before trial to order a court-ordered mental exam. An interest in upholding trial court actions, though, is not a disqualifying bias. ***Wise***, 879 S.W.2d at 523. Simmons' allegations of bias lack any merit.

As to the allegation that the judge should have been disqualified because of potential witness status, the only Rule 29.15 claim identified by Simmons as requiring the judge to be a witness is his claim that judges are assigned to death cases in St. Louis City based on their views on the death penalty. Simmons has failed to assert a compelling reason to have called the judge as a witness to support this claim at the postconviction hearing. ***See id.*** The judge did not clearly err in denying the motion to disqualify.

B. CONSTITUTIONALITY OF RULE 29.15

Simmons challenges the constitutionality of the time limits imposed by Rule 29.15. This constitutional challenge is again rejected. ***See Storey***, 901 S.W.2d at 900.

C. ATTORNEY SANCTIONS

During the couse of postconviction proceedings, the State repeatedly requested that, for various abuses, sanctions be imposed against Simmons' postconviction counsel. After consideration of the State's motions, and after conferencing with counsel from both sides, the postconviction court sanctioned Simmons' counsel, imposing a $250.00 fine. Preliminarily, we reject Simmons' counsel's contention that he did not have adequate notice and opportunity to respond to the motions for sanctions. These motions were properly served upon Simmons' counsel who did indeed respond to the motions; Simmons' counsel responded to these sanction requests, at least insofar as they concerned improper discovery attempts, in various filings.

The court based its sanctions on its findings that the following claims, asserted by Simmons' postconviction counsel, were frivolous, unreasonable and without foundation: (1) that Simmons' trial counsel was ineffective in failing to offer an alternative written instruction on "resaonable doubt;" (2) that exclusion of jurors who were unable to consider the full range of punishment violated the jurors' constitutional rights; (3) that the prosecutor engaged in misconduct; and (4) that Missouri's death penalty is unconstitutional because of prosecutorial discretion. The court also found that Simmons' counsel filed three postconviction discovery motions "solely for the purpose of harassing or vezing the State in the defense of the postconviction motion. . . ."

Rule 55.03(b) states, *inter alia*, that by filing a pleading, motion, or other paper with a court, the attorney or party is certifying that the claims presented are not intended to harass or cause unnecessary delay, are warranted by existing law or nonfrivolous argument for the extension, modification, or reversal of existing law, and have evidentiary support or are likely to have support

after a reasonable opportunity for further investigation or discovery. Rule 55.03(c) provides that sanctions may be imposed for violations of Rule 55.03(b). This rule applies to postconviction proceedings. ***Thurman v. State***, 859 S.W.2d 250, 254 (Mo.App. 1993). Because the imposition of sanctions is not an action upon a Rule 29.15 motion as described in Rule 29.15(j) (1994), we review the decision for abuse of discretion. ***See State v. Duong***, 935 S.W.2d 87, 88 (Mo.App. 1996); ***State v. Gardner***, 932 S.W.2d 858, 862 (Mo.App. 1996).

From our review of the record, the postconviction court did not abuse its discretion in imposing these sanctions on Simmons' counsel. Three of the claims cited, those concerning the reasonable doubt instructions, the death penalty, constitutionality, and the juror disqualification, have been firmly and uniformly rejected by previous decisions of this Court and the federal courts. ***See State v. Chambers***, 891 S.W.2d 93, 105, 113 (Mo.banc 1994) (reasonable doubt, constitutinoality of death penalty), ***State v. Harris***, 870 S.W.2d 798, 805-06 (Mo.banc 1994) (juror disqualification); ***Davis. v. Georgia***, 429 U.S. 122, 122-23 (1976) (juror disqualification); ***Murray v. Delo***, 34 F.3d 1367, 1381-82 (8th Cir. 1994) (reasonable doubt instruction); ***Battle v. Delo***, 19 F.3d 1547, 1562 (8th Cir. 1994) (death penalty constitutinality). In his postconviction motion, counsel did not present arguments designed ton confront and refute these decisions. Rather, he simply rehashed the arguments that these decisions had already rejected. This practice does not constitute "a nonfrivolous argument for the extension, modification, or reversal of existing law. . . ." Rule 55.03(b)(2). Counsel's assertion that preservation of these claims for federal review warrants their inclusion in the Rule 29.15 motion is unconvincing. Preservation of these claims is unnecessary, because, as

stated, the federal courts have rejected these same claims in other cases. Had the federal courts not rejected the claims previously, counsel's argument would bem uch more tenable. But to preserve the claims in the mere hope that the federal courts might someday change their position woulkd effectively preclude any claim from ever being frivolous and would render Rule 55.03(b) inoperative in all caess where federal review is possible. In short, this Court will not allow counsel to escape sanctions under Rule 55.03(b) merely by invoking the words "federal review."

The general allegations concerning prosecutorial misconduct at trial were unsupported by citations to the trial transcript or record both of which were fully available to Simmons' counsel.[1] Simmons does not explain how or why further investigation or discovery would be likely to uncover such misconduct. Therefore, the postconviction judge did not abuse his discretion in finding that these allegations violated Rule 55.03(b)(3).

Undoubtedly, sanctioning an attorney under Rule Rule 55.03(c) is a serious matter and should only be undertaken after careful consideration of the circumstances of the attorney's actions and the case before the court. We find that the trial judge undertook such careful consideration. Although no single violation of Rule 55.03(b) as found by the postconviction court necessarily warrants the imposition of the sanctions, the

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[1]Simmons' counsel did specifically allege two instances of conduct, one relating to the prosecutor's distribution of campaign literature, and one referring to his disqualification of Judge Peek. While these incidents were not found to constitute misconduct, they were sufficiently specifically alleged to comport with Rule 55.03(b).

several violations, when viewed as a whole, support the $250.00 fine.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Simmons makes several allegations of ineffective assistance of counsel. We address only those allegations that have not been rendered moot by our rejetion of the underlying claims of error. To win reversal of his conviction or death sentence because of ineffective assistance of counsel, Simmons must show that his counsel's performance was deficient, i.e. below the degree of skill, care, and diligence of a reasonably competent attorney, and that the deficiency prejudiced his defense. ***Strickland***, 466 U.S. at 687; ***Tokar***, 918 S.W.2d at 761. Indeed, he must show that his counsel failed both the performance and prejudice prongs of the ***Strickland*** test, and if he fails to satisfy either prong, we need not consider the other. ***Sidebottom v. State***, 781 S.W. 791, 795-96 (Mo.banc 1989), ***cert. denied***, 497 U.S. 1032 (1990). In reviewing the performance prong, Simmons must overcome the presumptions that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. ***Strickland***, 466 U.S. at 689-90. Counsel's actions that constitute sound trial strategy are not grounds for ineffective assistance claims. ***Storey***, 901 S.W.2d at 893. To prove prejudice, Simmons must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***Tokar***, 918 S.W.2d at 761. Finally, the determinations of the motion court will not be disturbed unless they are clearly erroneous. Rule 29.15(m), 29.15(j) (1994); ***Sanders v. State***, 738 S.W.2d 856, 857 (Mo.banc 1987).

1. Simmons' Competency to Stand Trial

Simmons contends that trial counsel was ineffective for failing to adequately investigate and present to the trial court the possibility that Simmons was incompetent to proceed to trial. Before his trial, Simmons' trial counsel had access to reports from four mental health professionals: (1) Dr. Daniel; (2) Dr. Fleming; (3) Dr. Parwatikar; and (4) Dr. Peterson. The reports by Dr. Daniel and Dr. Fleming had been completed in connection with Simmons' original trial for the murders of both Johnson and McClendon. Dr. Daniel determined that Simmons had no diagnosable psychiatric disorder, but Dr. Fleming reported that Simmons suffered from a delusional disorder that rendered him incompetent to proceed.

Drs. Parwatikar and Peterson were appointed during preparation for Simmons' separate trials for the murders of Johnson and McClendon. Dr. Parwatikar concluded that Simmons was competent to proceed to trial. This conclusion was based solely on the reports and data of others because Simmons refused to participate in an examination. Likewise, Simmons was uncooperative with Dr. Peterson. Dr. Peterson did issue a report but was unable to address the issue of Simmons' competency to stand trial.

After his separate trials, Simmons received additional examinations in preparation for the Rule 29.15 proceeding. Dr. Peterson again examined Simmons and this time concluded that he was not competent to assist his attorneys. Simmons was also evaluated by Dr. Harry, a psychiatrist appointed by the motion court at the State's request. Dr. Harry concluded that Simmons had a mental disease or defect but was competent to stand trial, both at the time of the evaluation and at the time of his trials.

He determined taht Simmons understood the proceedings against him based on the following factors: (1) he was able to describe the roles and functions of the major participants in courtroom proceedings; (2) he was aware of various legal defenses available to him; (3) he was aware of legal strategies including guilty pleas to lesser charges; (4) he understood court procedures; (5) he appreciated the charges against him as first degree murder; (6) he appreciated the range and nature of possible penalties should he be convicted; and (7) he was aware of the possible outcome. He also determined based on numerous additional factors that Simmons had the ability to assist his attorneys.

Simmons contends that trial counsel was ineffective for failing to conduct additional pretrial investigation into his competency to stand trial. However, trial counsel already had four mental health reports on Simmons. Further, Simmons had refused to cooperate with at least three of the psychiatrists that counsel had obtained to assist in the investigation, so counsel had no reason to believe that Simmons would cooperate with any other mental health experts. Under these circumstances, counsel's failure to pursue additional investigation into Simmons' competency status cannot be deemed unreasonable.

Simmons also accuses trial counsel of ineffectiveness in failing to present the issue of competency to the trial court. The conflicting report that were available on Simmons' mental status, however, provided little assistance in evaluating his competency. Moreover, trial counsel testified at the postconviction hearing that based on their extensive dealings with Simmons they believed that he did understand the proceedings against him and that he was able to assist them. We find that counsel's performance was not

deficient. In addition, we agree with the motion court's conclusion that Simmons was not precluded because he was competent to proceed to trial. The report of Dr. Harry fully supported the conclusion that Simmons was competent. The motion court found that Dr. Peterson's testimony lacked credibility and, therefore, rejected his finding of incompetency. We give deference to the motion court's superior opportunity to judge the credibility of the witnesses. ***State v. Twenter***, 818 S.W.2d 628, 635 (Mo.banc 1991).

We conclude that the motion court did not clearly err in denying Simmons claims that his trial counsel was ineffective with regard to the competency issue.

2. Failure to Object to Voir Dire Comments

Simmons presents for review several statements of the prosecutor made during voir dire and claims that his counsel was ineffective for failing to object to them. These statements include (1) repeatedly stating that the jury would provide a "recommendation" to the judge; (2) stating that all of the jury's guilt and penalty phase decisions have to be unanimous; (3) telling the jury that it could impose the death penalty if it thought or formed the personal opinion that death was appropriate and just; (4) various statements of the prosecutor to the effect that he would prove everything he was supposed to and that he represented the State; (5) allegedly encouraging the jury to prejudge the case by discussing the penalty phase as if they would reach it; and (6) several statements that Simmons interprets as seeking a commitment from the jurors to vote a certain way.

After review of these statements, we conclude that, even if objectionable, there is no reasonable probability that the outcome of the trial would have been

different had there been successful objection. *See* ***Strickland***, 466 U.S. at 694. Therefore, counsel cannot be considered ineffective for failing to object. A particularized ineffective assistance of counsel analysis of each remotely objectionable statement made during the course of a trial would serve no purpose other than to encourage future litigants to micro-dissect the transcript, as has occurred here. We do not choose to encourage this type of appellate practice. *See* ***Brown***, 902 S.W.2d at 300.

Simmons also recites statements of the trial judge during voir dire and labels them objectionable. These statements intimated that the jurors would not enjoy their service, were paid by the taxpayers, and that the process of criminal prosecutions were like a game, and should be speeded along. Apparently, Simmons' conclusion is that these statements induced the jurors to hasten their decisions at the end of the guilt and/or penalty phasees and not properly consider the evidence. Simmons offers no evidence to support that conclusion, and we do not share it. There was no ineffective assistance for not objecting.

3. Failure to Object to Remarks in Guilt Phase

During his guilt phase opening statement, the prosecutor stated that Simmons "deliberately, premeditatedly, after the lady pleaded with him, bludgeoned her to death...." Simmons contends that his counsel was ineffective for failing to object to this statement. This lone remark during opening argument does not give rise to a reasonable probability that the outcome would have differed had defense counsel objected. ***Strickland***, 466 U.S. at 694. No ineffective assistance is shown.

Simmons also complains of numerous statements during the prosecutor's guilt phase closing argument. Three of these statements were objected to, but Simmons asserts that his counsel was ineffective for failing to preserve them for appellate review because counsel did not include them in his motion for new trial: (1) that no evidence pointed to anyone but Simmons as the killer; (2) that the prosecutor hopes that Johnson was not alive during some of Simmons' brutal acts; and (3) telling the jurors that when they are through with this case, they will be free to talk to their friends and associates. There was no objection to the remainder of the complained-of comments, and Simmons asserts ineffective assistance of counsel for failure to do so: (1) ruminating on Johnson's possible future; (2) saying, "[d]id you hear that he was not guilty? Did you hear that this evidence shows him innocent?"; (3) saying, "when the Judge tells you that on or about November 30th the defendant caused the death of Cheri Johnson by strangling and suffocating her--let's leave the defendant word out of there. . . ."; (4) opining that if there was no deliberation in this case, then there is no deliberation in any murder; (5) complimenting the police work; (6) commenting on Simmons' usual style with women and that Simmons "is a cold-blooded lady killer"; (7) describing many methods of murder that are not included in the instructions, presumably to bolster the chances that this method of murder still constitutes the instructed-on crime; (8) comparing the confrontation between Simmons and Johnson, unfavorably, to a professional boxing match; and (9) telling the jurors that they "can't feel or see the paic" that Johnson must have felt at the time of the murder.

We have reviewed the foregoing guilt phase arguments and determine that counsel was either not deficient in failing to object or that no prejudice resulted from the failure to object. An extended analysis of each

statement would offer no precedential value. The point is denied.

4. Failure to Object to Guilt Phase Testimony

Simmons challenges a number of statements from various witnesses' testimony and asserts that his counsel was ineffective for failing to object. Simmons first alleges improper victim impact evidence in (1) Johnson's mother testifying that she gave a particular ring to her daughter and that her daughter agreed to give it to *her* daughter, and (2) a defense witness testifying on cross-examination that Johnson was a nice lady with whom he went to church. The first statement is not victim impact evidence but, rather, direct evidence that Johnson would not have given Simmons the ring voluntarily. The second statement, even if arguably victim impact evidence, is so totally innocuous as to warrant no further discussion.

Simmons also faults counsel for failing to object to what he believes to be hearsay: (1) a detective testifying that a particular witness told him that he, the witness, had called Johnson; (2) the same detective testifying that two other witnesses/potential suspects had given him alibis that checked out; (3) a detective testifying that a woman had identified Simmons from a photograph; (4) a detective testifying that flower shop employees had identified Simmons; and (5) a witness testifying that he knew that Johnson had caller ID. Incredibly, the first statement was elicited in response to specific questions from Simmons' counsel. The remainder of the statements are either not hearsay or present no possibility that, if they had been objected to, the outcome of the trial would have been different.

Additionally, Simmons complains that counsel failed to object to impermissible "other crimes" evidence

regarding these statements: (1) a flower shop employee testifying that she identified Simmons in 1989; (2) one of Simmons previous bosses testifying that Simmons was fired in November 1987; (3) a witness testifying that she asked Simmons to move out of her home in October 1987; and (4) a detective testiying that he canvassed a buildi8ng nthat Simmons' photograph in December 1987. The first is not an obvious reference to Simmons' first trial. The second and third are not comment on previous crimes. The fourth is a reference to Simmons' "mug shot photos" even more veiled than the argument we have already rejected directly.

There is no ineffective assistance of counsel in the failure to object to any of these statements during guilt phase. All in all, defense counsel apears to have done a remarkable job of objecting at the proper times.

5. Penalty Phase Evidence

a. Mental Health Evidence

Simmons contends trial counsel was ineffective for failing to adequately investigate and present evidence of a mental disease or defect during nthe penalty phase. As outlined above, four mental health professional completed evaluations of Simmons' mental health status. Simmons now contends that if trial counsel had provided the mental health professionals with more information, they would have been able to render more complete diagnoses that would have been helpful in the penalty phase. He ignores the statements in the reports of Drs. Parwatikar, Fleming, and Peterson that the reason they could not give a more complete diagnosis was Simmons' failure to cooperate in the examination process. Simmons is now attempting to blame his attorneys for the incomplete evaluation, when it is clear that the lack of a complete

evaluation was due to his own voluntary actions. Further, in spirit of Simmons' uncooperative nature, his trial counsel was able to obtain a report from Dr. Peterson that focused on relevant mitigating factors. Under these facts, we agree with the motion court's conclusion that Simmons' trial counsel conducted a reasonable investigation of his mental status.

Simmons also asserts that counsel was ineffective for failing to present available mental health information as mitigating evidence. In particular, he insists that counsel should have called Dr. Peterson to testify concerning relevant mitigating factors. Nevertheless, trial counsel testified at the postconviction hearing that a strategic decision was made not to call Dr. Peterson during the penalty phase because his report woulkd have been disclosed to the State and portions of it were particularly damaging to Simmons. Specifically, Dr. Peterson had noted that Simmons displayed "anger at women," that he linked statements of "love with precipitous physical aggression", and that "his own control over the switch from affection to physical violence after rejection or criticism was virtually non-existent."

Although Simmons emphasizes the need for mitigating evidence and discounts the harm that such evidence might cause him, we agree that Dr. Peterson's testimony would have reinforced the State's portrayal of Simmons as a predator who was violent towards women. As stated by the motion court:

> The past thing Simmons needed in defending a circumstantial case was psychiatric evidence which would demonstrate that he was psychologically capable, if not predisposed, to precisely the kind of violence against women which the

> State was positing. . . It was entirely reasonable for [trial counsel] to conclude that delving into Simmons' psyche in front of a jury would be aggravating, not mitigating, and would play directly into the State's hands.

It is clear that in this case Simmons has failed to overcome the presumption that trial counsel's decision not to pursue mental health evidence as a mitigating factor was sound trial strategy.

We find that the motion court did not clearly err in concluding that trial counsel was not ineffective in the investigation or pressentation of Simmons' mental health status.

b. Background Evidence

Simmons also aserts that his penalty phase defense was insufficient for lack of presentation of mitigating evidence concerning his background and upbringing. His mitigating defense consisted solely of his mother's testimony which emphasized the fact that she loved her son, missed him at holidays, would continue to love him if he served life in prison; and would draw value from a continued relationship with him. The defense strategy was not to seek mercy for Simmons' sake, but to demonstrate that there was a person, his mother, who would draw value from Simmons' continued existence, and who would suffer a loss from his death.

Simmons now argues that defense counsel should have offered more extensive mitigating evidence. He raises many aspects of his childhood (and his parents' childhood) that he considers as "mitigating."[2] These include both positive and negative aspects of his life. He cites, for example, both the fact that he enjoyed art as a grade school student and the fact that he had to repeat grades in grade school.

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[2]The background/upbringing information included, *inter alia*: (1) his parents came from the poor, racist South; (2) his mother was strict with him and sometimes beat him; (3) his father had a possible drinking problem; (4) his parents fought and Simmons sometimes tried to intervene; (5) his mother joined a restrictive religion and tried to get Simmons to join, also; (6) he, alternatively, either enjoyed school and did adequately, or did poorly in school; (7) he ran away from home at age 12 or 13 and was assaulted in Chicago; and (8) a judge's comments at a 1980s plea hearing, in which the judge said that Simmons had been one of her "good kids on probation."

During the penalty phase of Simmons' first murder trial, defense counsel had, in fact, placed much of this information before the jury. That jury, however, decided that the information did not mitigate the aggravating circumstances and sentenced Simmons to death. Considering that the strategy had once failed, and that calling Simmons' relatives to testify about his upbringing would inevitably highlight the fact that his brother had endured the same upbringing yet had become a successful doctor, we agree with the reasoning of the Rule 29.15 court.

> In light of all the information available to them, after discussion with their client, trial counsel decided to rely at penalty phase solely on a plea for mercy from Simmons' mother. This decision was premised on the demonstrated ineffectiveness of prior strategy concerning mitigating circumstances, which had sought to use testimony from [a person who went to church with Simmons' mother] and one of Simmons' previous work supervisors, the belief that comparisons by the jury bettween Simmons and a successful sibling . . . would be harmful, and the conclusion that the mother's plea was the best hope . . . In the final analysis, 1994 trial counsel concluded, rightly, that delving too deeply into Simmons' social history and upbringing would do more harm than good, by opening up dangerous avenues for the State to explore: "areas of danger," in [defense counsel's] words.

The penalty phase course of action was clearly sound trial strategy and, therefore, does not constitute ineffective assistance of counsel. *See* ***Storey***, 901 S.W.2d at 893.

6. Failure to Object to Penalty Phase Arguments

Simmons complains of a multitude of statements during the prosecutor's penalty phase closing argument. The only statement objected to, for which Simmons argues ineffective assistance of counsel for failing to preserve it for appellate review by omitting it from his motion for new trial, was where the prosecutor said, "[i]n talking to the police, did you ever hear him say one time. . . ." At this point, Simmons' objection was overruled, and the prosecutor continued to ask, "did you ever hear [Simmons say he was sorry]?" There was no objection to the remainder of the complained-of comments of the prosecutor, and Simmons asserts ineffective assistance of cousnel for failure to do so: (1) saying he felt in his heart that the case would end up in penalty phase; (2) speaking of his daughters and stating that he would have difficulty following the law if they were murdered; (3) various comments referencing Simmons' constitutional rights and his exercising of his right to trial; (4) arguably personalizing the case to the jury by mentioning women, daughters, sisters and wives as those who should not have to fear people like Simmons; (5) arguing two points allegedly not supported by the evidence -- what Simmons might have said to Johnson, and that Simmons has a history of abuse toward women; (6) saying that if there was no deliberation in the murder of Leonora McClendon, "there is no murder in this United States that could classify as deliberation then. I mean, there's not probably a worse horrible crime"; (7) telling the jury that if they do not decide on punishment, the judge will: (8) surmising that Johnson's father is "hoping and waiting" for the jury to do what he cannot; (9) arguing that the circumstances of the McClendon murder exhibited depravity of mind; (10) saying that Simmons deserved death for "everything that he has chosen to do in his life" and (11) making indirect references to cases from other

jurisdictions.

As with the guilt phase arguments, we have reviewed the foregoing penalty phase arguments and determine that counsel was either not deficient for failing to object or that no prejudice resulted from the failure to object. An extended analysis of each statement would offer no precedential value. The point is denied.

7. Failure to Preserve Penalty Phase Argument

During Simmons' penalty phase closing argument, the prosecutor objected to the statement that "men connicted of far worse killings have been allowed to live." The court sustained the objection on the basis that there was no evidence in the record to support the statement. Simmons now claims that his counsel was ineffective for failing to preserve in his motion for new trial the issue of whether the argument should have been allowed because it was proper mitigating evidence. However, "improper mitigating evidence" was not the basis of the sustained objection, and Simmons' postconviction motion merely alleged ineffective assistance of counsel for failing to present, earlier in the penalty phase, evidence to support the stricken statement. Therefore, post-trial counsel have not preperly preserved this point for appellate review.

IV. PROPORTIONALITY REVIEW

Under sec. 565.035, RSMo 1994, this Court is required to review the proportionality of the sentence of death imposed in this case. There is no evidence in the record before us that the jury or judge imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Further, the statutory aggravating circumstance found by the jury,

namely that the murder of Cheri Johnson involved depravity of mind, and was outrageously and wantonly vile, horrible, and inhuman, is amply supported by the evidence.

The death sentence in this case also is neither excessive nor disproportionate to the penalty imposed in similar cases. Johnson had been savagely beaten and strangled for four to five minutes before she died. The restraining necktie remained around her neck. Death by strangulation, after beating or other serious wounding of the victim, has supported previous death sentences. *See* ***State v. Kreutzer***, 928 S.W.2d 854, 860 (Mo.banc 1996); ***State v. Stokes***, 638 S.W.2d 715, 717-18 (Mo.banc 1982). Simmons' previous actions, assaulting other women and murdering Leonora McClendon, exhibited a pattern of crime, further supporting the imposition of the death sentence. *See* ***State v. Redden***, 728 S.W.2d 212, 222 (Mo.banc 1987).

V. CONCLUSION

For the above reasons, the judgments are affirmed.

Stephen N. Limbaugh, Jr., Judge

All concur.

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In The

Supreme Court of the United States

DON ROPER, Superintendent, Potosi Correctional Center,

Petitioner,

vs.

WILLIE SIMMONS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the court below erred in determining that Respondent's penalty phase counsel was ineffective for making the objectively unreasonable decision not to present any of the already available mitigating evidence on Respondent's behalf.

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the U.S. Court of Appeals (Pet. App. A6-A30) is reported at 299 F.3d 929 (8th Cir. 2002). The unpublished opinion of the district court is reproduced at Pet. App. A40-A149. The opinion of the Missouri Supreme Court (Pet. App. A152-A195) is reported at 955 S.W.2d 729 (Mo. 1997).

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 2002. The petition for a writ of certiorari was filed on January 6, 2003. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

REASONS FOR DENYING THE WRIT

Petitioner challenges the determination of the court below that Respondent received ineffective assistance from penalty phase counsel. The court below overturned both of Respondent's death sentences. Petitioner, however, chose to pursue a writ of certiorari in this case only, while allowing a sentence of life imprisonment to stand in Respondent's other case.

Additionally, the court below based its decision upon the fact that the Missouri Supreme Court's conclusions concerning the evidence presented during the penalty phase were "completely inaccurate." (Pet. App. A-19). The lower court's conclusion that penalty phase counsel was ineffective is amply supported by the record and does not

conflict with any decision of this Court or of any other court of appeals.

A. The Eighth Circuit's holding does not erase the line between investigation and trial strategy that this Court identified in *Strickland*.

In *Strickland v. Washington*, 466 U.S. 668, 690 (1984), this Court held that a defendant alleging ineffective assistance of counsel must not only show that his counsel was not functioning in accordance with the Sixth Amendment so as to provide reasonably effective assistance, but also that counsel's errors were so serious as to deprive the defendant of a fair trial because of a reasonable probability that, but for counsel's errors, the result would have been different. In so holding, this Court recognized the difference between counsel's pretrial investigation and counsel's strategic choices at trial. This Court correctly noted that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. *Strickland*, however, does not protect the unreasonable decisions in this case.

Moreover, the Eighth Circuit's opinion is entirely consistent with this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, this Court quoted, with approval, the district judge's finding that " . . . tactics as a matter of reasonable performance could not justify the omissions," when considering counsel's failure to present mitigating evidence. No further review of the Eighth Circuit's opinion is necessary to implement the standards previously set forth in this Court's decisions.

The Eighth Circuit's holding is in complete accord. Its decision simply reaffirmed that some trial strategy decisions

are so unreasonable that they form the basis of a claim of ineffective assistance of counsel. This principle is well recognized. See *U.S. v. Villapando*, 259 F.3d 934, 939 (8th Cir. 2001); *Crotts v. Smith*, 73 F.3d 861, 866 (9th Cir. 1996); *Ward v. United States*, 995 F.2d 1317, 1318-19 (6th Cir. 1993).

The argument advanced by Petitioner is not new. In *State v. McCarter*, 883 S.W.2d 75, 78 (Mo. App. 1994), the State of Missouri contended that any action taken by an attorney, if part of the attorney's trial strategy, cannot support a claim of ineffective assistance of counsel. The *McCarter* court correctly held that "[t]he wide latitude trial counsel has in matters of trial strategy does not amount to unconstrained discretion." *Id.* Relying upon *Strickland*, the *McCarter* court reaffirmed that the constraints imposed on trial counsel concerning strategy are that counsel's actions must be reasonable under prevailing professional norms. *Id.*

Here, penalty phase counsel's decision not to present evidence was completely unreasonable and denied Respondent effective assistance of counsel. Had such evidence been presented, Respondent showed that the likely result would have been different.

B. The Eighth Circuit Court of Appeals' decision is not contrary to *Strickland* and *Williams* and does not permit federal judges to replace counsel's strategic trial decisions.

As stated earlier, the Eighth Circuit's decision is not contrary to *Strickland* and *Williams*. It reaffirmed that some trial strategy decisions are so unreasonable that they can support a claim of ineffective assistance of counsel.

Petitioner incorrectly argues that the Eighth Circuit has erased the distinction between investigation and strategy and that federal judges will now supervise, post hoc, all aspects of trial strategy. Disregarding the fact that post-conviction proceedings require the reviewing court to review all decisions in hindsight, the law allows for the review of counsels' trial strategy decisions.

In *Lytle v. State*, 762 S.W.2d 830, 834 (Mo. App. 1988), the Missouri Court of Appeals recognized that trial strategy decisions can form the basis of ineffective assistance of counsel claims, albeit such instances will be rare. While most such challenges will be denied, it only makes sense that the opportunity to attack counsel's strategy decisions exists when appropriate. Accordingly, Petitioner's claims are unfounded.

C. The question posed here needs no resolution.

Petitioner correctly notes that the question presented in *Wiggins v. Corcoran*, No. 02-311 is different from that presented here. Despite Petitioner's assertions to the contrary, for the reasons already stated, the issue presented here has already been resolved and does not warrant re-examination by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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